122

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

No. 08-294
(consolidated with No. 08-289)

In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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February 19, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act ("EEOA") because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act ("NCLB"). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million-dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction's "basic premises" have not been "swept away."

The questions presented are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

PARTIES TO THE PROCEEDING

Petitioners, who were appellants in the court of appeals, are (i) the Speaker of the Arizona House of Representatives; and (ii) the President of the Arizona Senate.

Respondents, who were appellees in the court of appeals, are (i) Miriam Flores, individually and as a parent of Miriam Flores, minor child; (ii) Rosa Rzeslawski, individually and as a parent of Mario Rzeslawski, minor child; (ii) the State of Arizona; and (iv) the Arizona State Board of Education and its individual members in their official capacities.

Thomas C. Horne, Superintendent of Public Instruction, was an appellant in the court of appeals, and is the petitioner in the related, consolidated case, *Horne v. Flores*, Case No. 08-289.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
INTRODUCTION 1
OPINIONS BELOW 3
JURISDICTION 3
STATUTES AND REGULATIONS 4
STATEMENT OF THE CASE 5
A. The Statutory Framework 5
1. The Equal Educational Opportunity Act 5
2. Changes In Educational Theory 7
3. The No Child Left Behind Act 11
B. The District Court Proceedings 16
1. The 1992 Lawsuit 17
2. Arizona's ELL Programs 19
3. The Legislature's Intervention 24
4. The Order On Remand 26
C. The Ninth Circuit's Decision Following Remand 28
SUMMARY OF ARGUMENT 31
ARGUMENT 33
I. The Ninth Circuit Misapplied The Rule 60(b) Standard. 33

A. Rule 60(b) Requires A "Flexible" Standard In The Context Of Institutional Reform Litigation. 33

B. The Ninth Circuit's Decision Violates This Court's Precedents. 36

1. The Ninth Circuit Applied The Wrong Standard. 37

2. The Ninth Circuit Focused On The Wrong Considerations. 38

3. The Ninth Circuit Employed The Wrong Legal Baseline. 41

C. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b). 44

1. Changes In Fact Require Reassessing The Injunction. 44

2. Changes In Law Require Reassessing The Injunction. 50

II. Congressionally Mandated Requirements For ELL Instruction Set A Benchmark For "Appropriate Action" Under The EEOA. 51

A. Statutes Addressing The Same Subject Matter Should Be Interpreted In Harmony. 51

1. Complying With NCLB's Detailed Requirements Is "Appropriate." 52

2. Courts May Not Grant Remedies Under The EEOA That Conflict With Congressional Policies. 55

B. The Ninth Circuit's Approach Cannot Be Squared With Applicable Statutory Requirements. 57

C. The Ninth Circuit's Approach Contravenes Congress's Policy Judgments. 61

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools. 64

CONCLUSION 67

TABLE OF AUTHORITIES

Page(s)

Cases

Agostini v. Felton,
521 U.S. 203 (1997) 35

Alexander v. Britt,
89 F.3d 194 (4th Cir. 1996) 36

Board of Educ. of Oklahoma City Pub. Sch. v. Dowell,
498 U.S. 237 (1991) 34, 35, 38, 43, 50, 65

Bronx Household of Faith v. Board of Educ. of City of New York,
331 F.3d 342 (2d Cir. 2002).....34

Buckman Co. v. Plaintiffs' Legal Committee,
531 U.S. 341 (2001) 54

Building & Constr. for Trades Council of Philadelphia and Vicinity, AFL-CIO v. NLRB,
64 F.3d 880 (3d Cir. 1995).....36

Castaneda v. Pickard,
648 F.2d 989 (5th Cir. 1981) .....6, 7, 43, 48, 49, ... 52, 53, 59, 62

Clinton v. City of New York,
524 U.S. 417 (1998) 39, 40

Coleman v. Miller,
307 U.S. 433 (1939) 41

David B. v. McDonald,
116 F.3d 1146 (7th Cir. 1997) 50

Dayton Bd. of Educ. v. Brinkman,
433 U.S. 406 (1977) 33, 65

Doe v. Chao,
540 U.S. 614 (2004) 52

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.,
541 U.S. 246 (2004) 52, 58

Erlenbaugh v. United States,
409 U.S. 239 (1972) 54

Evans v. City of Chicago,
10 F.3d 474 (7th Cir. 1993) 36, 39, 41, 43,

FDA v. Brown & Williamson Tobacco,
529 U.S. 120 (2000) 54

Ferrell v. HUD,
186 F.3d 805 (7th Cir. 1999) 50

Frew v. Hawkins,
540 U.S. 431 (2004) 35, 38, 39, 43, 51

Hinck v. United States,
127 S. Ct. 2011 (2007) 53

Humble Oil & Refining Co. v. American Oil Co.,
405 F.2d 805 (8th Cir. 1969) 38

In re Detroit Dealers Ass'n,
84 F.3d 787 (6th Cir. 1996) 36

Jenkins v. Missouri,
639 F. Supp. 19 (W.D. Mo. 1985) 10

Kokoszka v. Belford,
417 U.S. 642 (1974) 52

League of United Latin Am. Citizens v. Clements,
999 F.2d 831 (5th Cir. 1993) 39, 40

Local 93, Int'l Ass'n v. City of Cleveland,
478 U.S. 501 (1986) 41

Lopez v. Gonzales,
549 U.S. 47 (2006) 53

Marchie Tiger v. Western Inv. Co.,
221 U.S. 286 (1911) 54

Martin v. Wilks,
490 U.S. 755 (1989) 41

Milliken v. Bradley,
418 U.S. 717 (1974) 66

Missouri v. Jenkins,
515 U.S. 70 (1995) 10, 47, 62, 64, 65

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 53

Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County,
128 S. Ct. 2733 (2008) 65

Morgan v. Kerrigan,
530 F.2d 401 (1st Cir. 1976) 55, 56

New York State Ass'n for Retarded Children, Inc. v. Carey,
706 F.2d 956 (2d Cir. 1983) 45

New York v. United States,
505 U.S. 144 (1992) 40

O'Sullivan v. City of Chicago,
396 F.3d 843 (7th Cir. 2005) 36

Patsy v. Board of Regents,
457 U.S. 496 (1982) 61

Rodriguez v. United States,
480 U.S. 522 (1987) 61

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) 31, 34, 38, 39, 44, 50

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,
128 S. Ct. 761 (2008) 55

System Fed'n No. 91, Ry. Employees' Dep't v. Wright,
364 U.S. 642 (1961) 34, 51

Thigpen v. Roberts,
468 U.S. 27 (1984) 65

United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.,
508 U.S. 439 (1993) 52

United States v. Estate of Romani,
523 U.S. 517 (1997) 60

United States v. Fausto,
484 U.S. 439 (1988) 32, 54, 60

United States v. Miami,
2 F.3d 1497 (11th Cir. 1993) 40

United States v. Swift & Co.,
286 U.S. 106 (1932) 37, 38, 39

Verizon Commn'cs Inc. v. Trinko,
540 U.S. 398 (2004) 54

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 55

Wachovia Bank v. Schmidt,
546 U.S. 303 (2006) 32, 54

Statutes and Rules

20 U.S.C. § 1234.....15, 16
20 U.S.C. § 1701.....5, 58
20 U.S.C. § 1703.....44, 57, 58, 59, 60
20 U.S.C. § 1706.....6
20 U.S.C. § 1712.....6, 28, 44, 56, 60, 65
20 U.S.C. § 1713.....6, 56
20 U.S.C. § 1758.....56, 59
20 U.S.C. § 6301.....12
20 U.S.C. § 6311.....12, 13, 14, 15, 16
20 U.S.C. § 6316.....15
20 U.S.C. § 6812.....13, 14, 53, 57, 59, 62
20 U.S.C. § 6823.....53, 57
20 U.S.C. § 6826.....57
20 U.S.C. § 6840.....14
20 U.S.C. § 6841.....14
20 U.S.C. § 6842.....14, 15
20 U.S.C. § 6845.....13
20 U.S.C. § 7844(3).....16
34 C.F.R. § 299.10.....16
34 C.F.R. § 299.11.....16
A.R.S. § 15-754.....19
A.R.S. § 15-756.06.....21
A.R.S. § 15-756.08.....20
Pub. L. No. 107-110 (Jan 8, 2002).....5

Pub. L. No. 93-380 (Aug. 21, 1974) 5

R7-2-805.C-F 16

Other Authorities

147 Cong. Rec. S. 13,365, 13,385
Statement of Sen. McCain (Dec. 18, 2001).....13

Burtless, Gary.
Introduction and Summary, in DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS (Gary Burtless, ed. 1996) 9

Ciotti, Paul.
Money and School Performance, in SCHOOL REFORM: THE CRITICAL ISSUES (Williamson M. Evers, *et al.* eds., 2001).....11

Evers, Williamson M. & Paul Clopton.
High-Spending, Low-Performing School Districts, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 10

Hanushek, Eric A.
The Failure of Input-Based Schooling Policies, 113 ECONOMIC J. 64 (2003) 9, 47

Joint Legislative Budget Committee,
JOINT CAUCUS BUDGET UPDATE (Jan. 14, 2009), *available at* http://www.azleg.gov.....48

Lindseth, Alfred A.
The Legal Backdrop to Adequacy, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN (Eric A. Hanushek ed., 2006) 10

National Conference of State Legislatures, UPDATE ON STATE BUDGET GAPS: FY2009 & FY2010 (Feb. 6, 2009) 48

Not Getting Left Behind, WASHINGTON POST, Feb. 5, 2006 60

Rotherham, Andrew.
Toward Performance-Based Federal Education Funding (Apr. 1999) 11

Rudalevige, Andrew.
No Child Left Behind: Forging A Congressional Compromise, in NO CHILD LEFT BEHIND? (Paul E. Peterson & Martin R. West, eds. 2003) 11

THE COMPACT OXFORD ENGLISH DICTIONARY (2d ed. 2000) 58

West, Martin R. & Paul E. Peterson.
The Adequacy Lawsuit: A Critical Appraisal, in SCHOOL MONEY TRIALS (Martin R. West & Paul E. Peterson, eds. 2007) 9

West, Martin R. & Paul E. Peterson.
The Politics and Practice of Accountability, in NO CHILD LEFT BEHIND? (Paul E. Peterson & Martin R. West, eds. 2003) 8

INTRODUCTION

This case has drawn the federal judiciary into a highly politicized debate among Arizona's citizens and local officials over how to structure (and fund) Arizona's programs for teaching English to students as a second language. What began as a declaratory judgment action concerning the adequacy of English-language-learner ("ELL") programs in Nogales Unified School District ("Nogales"), a single school district on the Arizona-Mexico border, has mutated into a sweeping, state-wide injunction against Arizona's officials. Specifically, the district court has ordered the Arizona Legislature, on threat of multi-million-dollar penalties, to enact legislation that substantially increases state-wide funding for ELL instruction.

Whatever the merits of the injunction when it was first entered in 2001, Arizona is not engaged in a continuing violation of federal law and the injunction is no longer appropriate. It is undisputed that successful structural reforms in Nogales have invigorated local school management, improved teacher quality, increased salaries, cut costs, eliminated shortages in instructional materials, reduced class sizes, and implemented monitoring programs to ensure that all students are meeting performance standards. The Arizona Legislature has more than doubled ELL funding and substantially expanded overall school funding, which individual school districts may use as needed for ELL instruction. Teachers and educational experts agree that Nogales is running "exemplary"

ELL programs and has adequate financial resources to help ELL students overcome language barriers. *See* JA 146, 192, 199-200. Equally important, in 2002, Congress passed comprehensive education reform that seeks to promote accountability by preserving flexibility for local educational officials, vests regulatory oversight in the Department of Education, and sets measurable performance objectives that States and local schools are required to attain.

In the wake of these developments, the Ninth Circuit should have applied a "flexible" standard under Federal Rule of Civil Procedure 60(b), as required under this Court's precedents. Instead, the Ninth Circuit applied the wrong standard, relied on its own elaborate "factual findings," and second-guessed the educational policies favored by Arizona's local officials. The upshot is that, with the State currently laboring under a billion-dollar deficit, the Arizona Legislature finds itself cabined by the equitable powers of the Article III branch. Even more troubling, the federal judiciary's mandate could well harm the very students it is supposed to serve. Petitioners are deeply concerned that, because ELL-specific funding is based on the number of students participating in ELL programs—not the number of students who become proficient in English—the lower courts' approach will create perverse incentives to keep students languishing in special-language programs.

OPINIONS BELOW

The opinion of the court of appeals is reported at 516 F.3d 1140, and reprinted at Pet. App. 1a. The district court's order denying relief under Federal Rule of Civil Procedure 60(b) is reported at 480 F. Supp. 2d 1157, and reprinted at Pet. App. 96a. The district court's order finding a violation of the Equal Educational Opportunity Act, 20 U.S.C. §§ 1701 *et seq.*, is reported at 172 F. Supp. 2d 1225, and reprinted at Pet. App. 117a.

JURISDICTION

The court of appeals rendered its decision on February 22, 2008, and denied a timely petition for rehearing and rehearing en banc on April 17, 2008. Pet. App. 92a. On July 11, 2008, Justice Kennedy extended the time for filing the petition to and including September 1, 2008. (Because September 1, 2008 was a legal holiday, the time for filing was extended to and including September 2, 2008. *See* S. Ct. R. 30.1.) The petition was filed on September 2, 2008, and granted on January 9, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Title 20, section 1703 of the United States Code, codifying the Equal Educational Opportunity Act of 1974, provides in pertinent part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ...
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The pertinent parts of Title 20, sections 6301 *et seq.* of the United States Code, codifying the No Child Left Behind Act of 2001, are reprinted at Pet. App. 193a.

Rule 60(b) of the Federal Rules of Civil Procedure is set forth in its entirety at Pet. App. 335a.

For the Court's convenience, the most cited provisions from the pertinent statutes and rules are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

This case calls upon the Court to address once again the proper standards under Rule 60(b) for modifying a district court decree in the context of institutional reform litigation.

A. The Statutory Framework

The issues in this case arise at the intersection of two parts of the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended: (i) Title II of the 1974 amendments, Equal Educational Opportunities and Transportation of Students, known as the "Equal Educational Opportunity Act of 1974" ("EEOA"), *see* Pub. L. No. 93-380 (Aug. 21, 1974); and (ii) Title I of the 2002 amendments, Strengthening and Improvement of Elementary and Secondary Schools, known as the "No Child Left Behind Act of 2001" ("NCLB"), *see* Pub. L. No. 107-110 (Jan 8, 2002).

1. The Equal Educational Opportunity Act

In 1974, Congress enacted the EEOA, alongside revisions to the Bilingual Education Act, as an amendment to the ESEA. *See* Pub. L. No. 93-380, 88 Stat. 484. The EEOA declares that, as a national policy, "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin." 20 U.S.C. § 1701(a). Focused on the then-profound problems of desegregation, the 1974 measure's stated purpose is to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system." *Id.* § 1701(b).

1. Although the EEOA permits any individual "denied an equal educational opportunity" to "institute a civil action" in federal district court, *id.* § 1706, Congress carefully delimited the statutorily-available remedies. The EEOA mandates that a court "shall seek or impose *only* such remedies as are *essential* to correct *particular* denials of equal educational opportunity or equal protection of laws." *Id.* § 1712 (emphasis added). The statute identifies a "priority of remedies" and, before the grant of any form of relief, requires courts to make "specific findings on the efficacy" of the remedies it has chosen. *Id.* § 1713.

In seeking to eliminate the vestiges of dual school systems, Congress also prohibited discrimination against non-English-speaking students. Section 1703(f) provides:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs.

(emphasis added). Congress provided no guidance, however, as to the meaning of "appropriate action." The statute fails to define the term, and the legislative history is unilluminating. *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981).

2. Lamenting the absence of congressional guidance, the Fifth Circuit in its oft-cited *Castaneda* decision "reluctantly" crafted a three-part test for measuring compliance with section 1703(f): (i) whether the school's language remediation plan is grounded in sound educational theory; (ii) whether the school's "programs and practices" are "reasonably calculated to implement effectively" that theory; and (iii) whether the school's programs over time produce satisfactory results. *Id.* at 1009-1010. In fashioning its tripartite test, the Fifth Circuit emphasized that "Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques" necessary to satisfy the EEOA's strictures. *Id.* at 1009. The court expressly warned against substituting the federal judiciary's "educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators." *Id.* at 1009.

2. Changes In Educational Theory

In the decades following the EEOA's enactment, educational theory underwent a sweeping transformation. Discrediting the notion that more money constitutes a magical formula for improving struggling schools, significant evidence showed that certain approaches to education were more effective than others, and that court-mandated reforms often do more harm than good. A rising chorus of educational experts urged the federal government to jettison its narrow focus on increasing resources and, instead, to create proper

incentives for effectively employing the funding already being channeled into America's schools.

1. In the first half of the Twentieth Century, the American education system was widely regarded as the best in the world. Americans were "proud of what their schools had already accomplished," and education "came to be seen as the solution to almost all the country's ailments," including "problems associated with civil rights, ... immigration, ...[and] economic inequality." Martin R. West & Paul E. Peterson, *The Politics and Practice of Accountability*, *in* NO CHILD LEFT BEHIND? 4 (Paul E. Peterson & Martin R. West, eds. 2003). In the late 1970s and early 1980s, however, this sanguine view of America's public school system came under assault. Standardized test scores showed that (i) student performance declined throughout the 1970s, and (ii) American students were lagging far behind their peers in other countries. *Id.* at 5. In 1983, a national commission appointed by the Secretary of Education issued a widely-discussed report, entitled *A Nation At Risk*, that called for wide-ranging reforms in the nation's public schools. *A Nation At Risk* warned that the "quality of America's schools was leaving the country endangered by foreign competition." *Id.* at 5-6.

2. At the same time, advocates for increased school spending turned to the judiciary to attain policy outcomes that could not be achieved through democratic processes. Although cases were brought under different theories, the animating principle was often the same—more resources would beget improved student achievement. The period

between the 1970s and late 1990s therefore witnessed a steady growth in litigation seeking to compel increases in public-school funding. Responding to court orders became "a consuming concern for governors and legislators" forced to balance demands for expanded educational spending "against revenue constraints and other fiscal obligations." Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, *in* SCHOOL MONEY TRIALS 2 (Martin R. West & Paul E. Peterson, eds. 2007).

In the midst of this rising litigation, mounting evidence suggested that "[i]ncreased spending on school inputs ha[d] *not* led to notable gains in school performance." Gary Burtless, *Introduction and Summary*, *in* DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 5 (Gary Burtless, ed. 1996) (emphasis added). Even though average spending per student, controlling for inflation, increased by more than 60 percent between 1966 and 1980, American students were not receiving a better education. Leading scholars from different fields reached similar conclusions: "[b]road evidence from the experience" both in the United States and in "the rest of the world" showed that significantly expanding financial resources was not helping America's schoolchildren. Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 ECONOMIC J. 64, 66-69 (2003) (although "input policies have been vigorously pursued over a long period of time," there "is no evidence that the added resources have improved student performance").

3. A dramatic example of the litigation-driven approach to education reform is *Jenkins v. Missouri*, involving the desegregation of public schools in Kansas City, Missouri. *See Jenkins v. Missouri*, 639 F. Supp. 19, 23-24 (W.D. Mo. 1985); *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995). In a series of orders beginning in 1986, a federal court mandated that Missouri spend an additional $1.5 billion to improve the quality of education offered in a school district of 37,000 students. At the court's direction, the school district boosted per-student spending, dramatically increased teacher salaries, reduced teacher work loads and class sizes, and made multi-million dollar investments in state-of-the-art facilities and resources.

The upshot was failure. None of this "court-ordered largess led to better scores by the school district's students on nationally normed tests." Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, *in* COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 39 (Eric A. Hanushek ed., 2006). Test scores in Kansas City schools "had an almost inverse correlation" to the amount of "improvements" ordered by the district court. Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, *in* COURTING FAILURE, *supra*, at 111. Like failed efforts in other school districts in other States, the Kansas City experiment further confirmed that "the structural problems of our current educational system are far more important than a lack of material resources." Paul Ciotti, *Money and School*

Performance, *in* SCHOOL REFORM: THE CRITICAL ISSUES 308 (Williamson M. Evers, *et al.* eds., 2001).

4. In April 1999, an influential white paper by Andrew Rotherham of the Democratic Leadership Council Progressive Policy Institute gave voice to an emerging bipartisan consensus calling for a radically revised approach to public education. *See* Andrew Rotherham, *Toward Performance-Based Federal Education Funding* (Apr. 1999); *see also* Andrew Rudalevige, *No Child Left Behind: Forging A Congressional Compromise*, *in* NO CHILD LEFT BEHIND?, *supra*, at 31. The white paper argued that "the federal role in education must become flexible and performance-based." Rotherham, *supra*, at 2. Criticizing attempts to "micro-manag[e]" how "local school officials raise their students and teachers to higher levels of performance," the paper urged the federal government to "get out of the business of accounting for programmatic inputs and instead [to] focus more strategically on empowering citizens with information, setting broad standards and goals, measuring and comparing results, and researching effective strategies for school improvement." *Id.* at 3. Recognizing that "simply spending a lot of money doesn't guarantee that impoverished students are receiving a quality education," the paper argued that the federal government should "demand results" and not "regulate means." *Id.* at 18.

3. The No Child Left Behind Act

Against this backdrop, Congress comprehensively restructured federal education

policy in the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. §§ 6301 *et seq.* The statute is complex, consisting of more than 650 pages of statutory text with approximately 700 more pages of implementing regulations. *See* 34 C.F.R. §§ 200 *et al.* Designed to meet the goal that all students achieve proficiency in reading and math by 2014, NCLB represents a tectonic shift in federal education policy.

NCLB embraces a framework for achieving results-based accountability constructed around three central policy judgments: (i) States and local officials should have flexibility to design and administer programs suited for local circumstances; (ii) the federal government should not dictate schooling inputs (such as funding, class size, and teacher credentials), but instead should focus on outputs, requiring that States and local schools meet objective, measurable student performance standards; and (iii) education presents complex regulatory challenges more appropriately addressed through an administrative process rather than litigation.

Flexibility For Local Educational Officials. Although substantially extending federal oversight of American schools, NCLB is not mandatory—States may "opt out" by electing to forgo federal education funding. 20 U.S.C. § 6311(a)(1). If a State accepts federal funding, however, it is required to develop a compliance plan that requires its schools to implement student skills "assessments" (for example, by administering standardized tests) in each grade. *Id.* § 6311(b)(2)(A). The results of these assessments

are then used to hold local officials accountable by determining whether schools have made "adequate yearly progress" toward meeting proficiency standards. *Id.*

Within these parameters, NCLB leaves States broad discretion to develop their own individualized education plans. Congress designed the statute to "take away power from education bureaucrats and return it to those on the front lines of education: the local schools, the local teachers, and the local parents." 147 Cong. Rec. S. 13,365, 13,385 (Dec. 18, 2001) (statement of Sen. McCain). Accordingly, one of NCLB's express purposes, appearing on the face of the statute, is to "provide" local educational agencies "with the *flexibility* to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English." 20 U.S.C. § 6812(9) (emphasis added). Most relevant here, NCLB makes clear that it shall not be construed to require a local educational agency "to establish, continue, or eliminate any particular type of instructional program" for ELL students. *Id.* § 6845.

Outputs Not Inputs. NCLB holds schools accountable for achieving objective, measurable results, but assiduously avoids dictating programmatic inputs. NCLB's focus on assessment means a focus on *student skill* assessment—as opposed to inputs like library books, classroom computers, student-teacher ratios, or expenditures per student. *See id.* § 6311(b).

To achieve its goals, the statute sets out detailed procedures for measuring student proficiency and compiling information to determine whether schools are satisfying performance goals. *See id.* § 6311. Most relevantly, NCLB's Title III—known as the "English Language Acquisition, Language Enhancement, and Academic Achievement Act"—holds state and local educational agencies accountable for the academic progress of ELL students. *Id.* § 6812(8). Title III's requirements, incorporating provisions from the Bilingual Education Act of 1968, are not guidelines but mandates. They are, in a word, extensive.

Every school receiving a Title III sub-grant must develop a "local plan" containing assurances that "programs will enable children to speak, read, write, and comprehend the English language and meet challenging State academic content and student academic achievement standards." *Id.* § 6840. In addition, the school must biennially evaluate its ELL program, providing "a description of the progress made by children in learning the English language and meeting challenging state academic content and student academic achievement standards." *Id.* § 6841(a). Schools are obliged to monitor students and track their achievement "for each of the 2 years after" they depart the ELL program. *Id.* In addition, schools must set "annual measurable achievement objectives" that accurately measure, among other things, a child's "development and attainment of English proficiency." *Id.* § 6842(a)(2). These measurable objectives require annual increases in the percentage of children making progress toward

and attaining English proficiency. *Id.* § 6842(a)(3)(A).

Failure to meet Title III's standards requires a school to jettison ineffective programs. Schools that fail to make adequate annual progress toward satisfying federal proficiency standards are subject to escalating sanctions. *Id.* § 6316(b). If a school fails to make satisfactory progress for two consecutive years, then the school must develop an "improvement plan" and obtain "technical assistance" from the State. *Id.* § 6842(b). If a school fails to make satisfactory progress in four consecutive years, then the local educational agency must either (i) replace "all or most of the school staff" and turn operations over to a private management company, or (ii) surrender control to state government. *Id.* § 6316(b)(8).

Department of Education Oversight. In contrast to the EEOA, NCLB does not include a private right of action. Instead, Congress vested the Department of Education with authority in the first instance to determine whether state compliance plans satisfy federal requirements. States must submit their compliance plans to the Department for approval. For its part, the Department enjoys broad authority to compel compliance with federal programs by withholding federal funds; issuing cease-and-desist orders; entering into compliance agreements; or by "tak[ing] any other action authorized by law." *Id.* § 1234c(a); *see also id.* § 6311(a), (g). The Department's Office of Administrative Law Judges is responsible for conducting hearings in connection with the agency's enforcement actions. *See id.*

§§ 1234(a), 1234e-g (providing for discretionary review of ALJ decisions and judicial review in the courts of appeals).

In addition to jurisdiction over a State's programmatic compliance, NCLB as implemented gives the Department ultimate authority over the complaints of individual students. NCLB requires States to develop "written procedures for the receipt and resolution of complaints alleging violations of law" in the administration of educational programs under the statute. *Id.* § 7844(3). In its implementing regulations, the Department of Education has mandated that States adopt written procedures for "receiving and resolving any complaint from an organization or individual" that a local educational agency "is violating a Federal statute or regulation that applies" to programs operated by local educational agencies under NCLB. 34 C.F.R. § 299.10(a)(1); *see also* 20 U.S.C. § 6311. Implementing NCLB's requirements, Arizona law provides that an aggrieved party may file a complaint with the local education agency and that any adverse decision may be appealed to the Department of Education. *See* R7-2-805.C-F; 34 C.F.R. § 299.11(c).

B. The District Court Proceedings

Long before NCLB, respondents filed this litigation as a declaratory judgment action concerning the adequacy of ELL instruction in a single school district on the Arizona-Mexico border. The litigation has since mutated into a sweeping, state-wide injunctive proceeding against Arizona's officials.

1. The 1992 Lawsuit

1. The Nogales Unified School District, located in Arizona's largest border town, has six elementary schools, two middle schools, one high school, and an alternative high school. Pet. App. 6a. Nearly all of Nogales's student population is Hispanic or Latino. The Census Bureau estimates that 93 percent of Nogales's population (20,878 people) speaks a language other than English at home. As of 2006, approximately 30 percent of Nogales's students were enrolled as English-language-learners, with some 60 percent having previously participated in ELL programs. *See id.*

In 1992, certain Nogales students and their parents filed a class action lawsuit in federal district court against the State of Arizona, the Superintendent of Public Instruction, and individual officials of the Arizona State Board of Education. Alleging violations of the EEOA, plaintiffs sought declaratory and injunctive relief. *See* JA 2-3. Invoking section 1703(f), plaintiffs contended that Arizona officials were not taking "appropriate action" to educate Nogales's non-English speaking schoolchildren. Pet. App. 118a (defining class as "all minority 'at risk' and limited English proficient (LEP) children now or hereafter enrolled in Nogales Unified School as well as their parents and guardians").

2. After lengthy pre-trial proceedings, the parties split the case in two, settling part of it and litigating to trial whether Arizona was adequately funding and overseeing Nogales's ELL programs. Pet. App. 119a-120a. After a three-day bench trial,

on January 24, 2000, the district court granted declaratory relief on the non-settled portion of the case. The court held that local officials were not taking "appropriate action" because, although the State's programs were based on sound educational theory, the State "failed to follow through with practices, resources and personnel necessary to transform the theory into reality." Pet. App. 151a. The district court expressed concern that funding earmarked for ELL programs failed to cover the entire cost of ELL instruction. *See id.* The Court suggested that insufficient funding was adversely affecting Nogales's bilingual-education programs in six respects: (i) too many students in a classroom; (ii) not enough classrooms; (iii) not enough qualified teachers; (iv) not enough teacher aids; (v) inadequate tutoring programs; and (vi) insufficient teaching materials. Pet. App. 149a-150a.

Six months later, on July 31, 2000, the court approved the parties' settlement, as memorialized in a consent decree. The decree resolved plaintiffs' claims with respect to (i) the evaluation and monitoring of students; (ii) tutoring and other compensatory instruction; and (iii) the structure of English language curriculum. Pet. App. 10a. All parties here agree that, in light of the consent decree, the "*only* unresolved dispute"—and the only EEOA issue on which the district court has based its continuing injunction—is Arizona's alleged "failure to provide school districts with adequate funding." Cert. Opp. 28 (emphasis added).

2. Arizona's ELL Programs

In the wake of the district court's 2000 declaratory judgment, Arizona implemented significant changes in funding, curriculum, and protocols. Pet. App. 30a-31a. These changes have substantially altered how Arizona implements its ELL programs and appreciably increased funding available for ELL instruction.

1. In November 2000, Arizona's voters passed Proposition 203, requiring (i) all classes in Arizona's public schools to be taught in English; and (ii) ELL students to be educated in separate, structured immersion classes until they achieve English proficiency. Pet. App. 369a-379a. Whereas traditional bilingual-education programs taught non-language subjects (such as math, science, and history) in students' native languages, Proposition 203 mandates that, unless parents request bilingual instruction, ELL students be taught in English tailored to a level they can understand. Proposition 203 allows parents to bring suit to enforce its provisions and remains the law in Arizona. *See* A.R.S. § 15-754.

2. In conjunction with restructuring its teaching methodology, Arizona implemented statewide measures designed to enhance the effectiveness of its ELL programs. Arizona's English-immersion instructors must complete a curriculum—available through a partnership between the State and its universities—to obtain the qualification needed to teach ELL students. *See* JA 166-67, 303-13, 364-376. To reimburse educators who obtain this "endorsement," Arizona

has established a $13.5 million annual fund, known as the "SEI Reimbursement Fund." JA 364-376.

Arizona also developed standards for determining whether its programs are in fact operating effectively. *See* JA 200-201. Working with a nationally-acclaimed expert, Arizona created English Language Proficiency Standards that provide ELL instructors with reading and writing performance targets. JA 159-60. The standards were reviewed by a team of national and local experts, and the State conducted regional focus groups to determine whether the standards properly evaluate ELL curricula and student performance. *Id.* The standards have been employed by educators to develop "a viable, consistent and workable curriculum for ELLs and English acquisition." JA 364-376. These standards have been recognized as going from "zero to 10" in providing a benchmark for measuring English proficiency. Pet. App. 339a-340a.

The State's Department of Education has taken an active role in monitoring and working with individual districts to (i) organize ELL classrooms; (ii) arrange class composition; and (iii) determine when ELL students should be transferred to mainstream classes. Pet. App. 354a-355a; A.R.S. § 15-756.08. The Department regularly consults with local ELL instructors and holds monthly ELL development meetings to discuss technical issues, provide information, and answer questions from administrators and teachers. JA 175-176, 364-376. Annual seminars supplement these monthly meetings, and breakout sessions allow teachers to seek additional

assistance. JA 176-179. Department-developed ELL program models guide school districts in effectively organizing and structuring ELL classrooms. JA 184.

Monitoring programs that did not exist in 2000 have been implemented to track ELL students' day-to-day progress. Pet. App. 351a-354a; JA 200-201. Arizona's schools employ the Arizona English Language Learner Assessment ("AzELLA") to test student achievement. The results of these tests are then summarized in annual reports to the State Department of Education identifying the rate at which ELL students are achieving English proficiency. Pet. App. 341a-343a. Arizona requires schools to assess "reclassified" students for two consecutive years after they exit the ELL system, ensuring they are given the best possible opportunity to succeed in mainstream classrooms. A.R.S. § 15-756.06.

To back up these reporting and monitoring requirements, Arizona's English Acquisition Services Division conducts several dozen annual site visits to evaluate local ELL programs and provide assistance as necessary to local administrators. JA 153-154. The Division annually monitors at least 12 school districts or charter schools from the 50 Arizona school districts or charters with the highest number of ELL students, as well as at least 10 school districts where ELL students are a minority of the student population. JA 313-319. The Division also selects a monthly sample of 300 ELL students to test English reading ability. *Id.* If the Division finds that a school is falling short of state standards, the

school is required to take corrective action to address those deficiencies. *Id.*

3. Working with local officials, Arizona has substantially improved Nogales's ELL programs. The benefits of higher-quality teachers, a new tutoring program, and more comprehensive instruction materials have borne measurable results. For instance, the Arizona Department of Education ranked 628 schools (each with more than 100 ELL students enrolled) according to student performance in 2005 on the Arizona Instrument to Measure Skills test. Pet. App. 363a-366a. Nogales had four schools within the top ten, and five within the top 50. Pet. App. 365a-366a. In September 2006, the local Superintendent reported that Nogales "students outscored state averages even when distinctions are made between fluent English-speaking students and English learners." JA 336-338. Compared to other districts with high Hispanic or Latino populations, Nogales's performance was superior at almost every grade level. *Id.*

4. In addition to upgrading its ELL programs, both in Nogales and statewide, Arizona significantly increased the funding available for ELL instruction. In December 2001, the Legislature passed H.B. 2010, doubling the funding each district received per ELL student and appropriating additional money for ELL instruction materials, teacher training, compensatory education, and reclassification of students as English proficient. Pet. App. 380a-428a. Arizona also greatly increased its basic school-funding packages. Pet. App. 31a. Proposition 301,

approved by the voters in 2000, increased the state sales tax by six-tenths of a percent to fund increased base-teacher salaries, teacher-performance pay, and tutoring programs for underperforming students. Pet. App. 358a-361a. Similarly, Arizona's voters approved measures ensuring that a portion of all Indian gaming proceeds are channeled to Arizona's schools. Pet. App. 361a.

As a result of these initiatives, support for overall education grew from an inflation-adjusted $3,139 per pupil in 2000 to an estimated $3,570 in 2006. Pet. App. 31a. The difference is even more pronounced when taking into account local funding, which rose from $5,677 per pupil in 2000 to $6,412 in 2006. *Id.* Federal funding likewise increased, from $526 per pupil in 2000 to about $953 in 2006. *Id.*

5. This trend of dramatic funding increases fully applies to Nogales. In 2000, Nogales voters agreed to increase property taxes to be used for any educational purpose. Pet. App. 430a-431a. The proceeds flowing directly to Nogales as a result of these property tax increases grew from $895,891 in FY2001 to over $1.6 million in FY2007. Pet. App. 431a. Other resources not available in 2000—including the "State Tutoring Fund" and the "AIMS Intervention/Dropout Prevent Program"—contribute millions of dollars annually to Nogales's schools. In 2007 alone, Nogales received approximately $2.3 million in additional funds pursuant to Proposition 301. Nogales's discretionary budget has increased 34 percent from 2000 to 2007. *See* JA 216, 355.

6. These educational improvements have not gone unnoticed by Arizona's most respected teachers. Two such teachers—Ms. Irene Moreno and Ms. Margaret Garcia-Dugan—with over sixty years of combined experience teaching and administrating ELL programs in Arizona's schools testified in support of petitioners. *See* JA 132-141, 147-153. Both teachers testified that Nogales is administering a successful ELL program and providing appropriate ELL instruction to its students. *See* JA 192 (Q: does Nogales "have sufficient resources to provide an excellent program for NUSD's ELL students so they can overcome language deficiencies? A: Yes, very definitely"). As Ms. Garcia-Dugan stated: Nogales "is doing an exemplary job with their English language learners." JA 146.

3. The Legislature's Intervention

Notwithstanding these significant changes in Arizona's ELL programs and substantial increases in educational funding, the district court steadily extended its reach over Arizona's schools.

1. On June 25, 2001, even though the certified class included only Nogales students, the district court expanded its declaratory judgment to apply on a statewide basis and granted injunctive relief accordingly. In doing so, the district court made no particularized findings that any other Arizona school district's ELL programs were ineffective or that any other individual ELL student in any other school district was denied an equal educational opportunity. Instead, the district court justified extending the injunction on grounds

that, as a matter of law, the funding Arizona provided for ELL programs was arbitrary because it "bears no relation to the actual funding" needed to ensure that ELL students achieve "mastery" of essential skills. JA 44.

In 2005, the court concluded that Arizona still was not adequately funding ELL programs because it was not earmarking ELL-specific funds to cover the entire cost of ELL instruction, but was instead permitting local school officials to play a role in ELL funding decisions. Pet. App. 173a-174a. The court then commanded the Legislature, which was not party to the suit, to allocate more taxpayer dollars to ELL instruction or face multi-million-dollar penalties. The court gave the Legislature 15 days from the beginning of the legislative session to comply with its order. In the event the Legislature failed to enact legislation to the court's satisfaction, the State would face fines of $500,000 per day (escalating over time to $2 million per day).

2. The Legislature responded by attempting to satisfy the district court's concerns. After significant negotiation and fact-finding, on March 2, 2006, the Legislature enacted H.B. 2064. H.B. 2064 implemented funding increases of roughly $14 million in what is referred to as "group B" funding (the additional funds a school directly receives for each student in an ELL program); $10 million to fund local ELL programs; and another $7 million to assess student progress and provide ELL materials. Pet. App. 268a. Under these provisions, slated to take effect after the district court's confirmation that Arizona has taken "appropriate action," Arizona's schools will receive $444 in funding for

each ELL student in addition to approximately $7,400 per student in general funding. To the extent this funding is inadequate for any particular school district, H.B. 2064 establishes a statewide compensatory instruction fund, as well as a specific fund for structured-English-immersion that may be used to cover school districts' incremental costs of ELL instruction.

In addition, because the named defendants expressly indicated their support for the district court's injunction, petitioners, the Speaker of the Arizona House and the President of the Arizona Senate, acting in their official capacities as presiding officers of their respective legislative bodies, intervened without objection in March 2006. Pet. App. 175a; *see also* JA 55-85. Along with the Superintendent of Public Instruction, petitioners moved to purge the citation of contempt and sought relief from judgment under Rule 60(b). Pet. App. 28a.

4. The Order On Remand

On April 25, 2006, the district court denied the request to modify the injunction, announcing its dissatisfaction with newly-enacted H.B. 2064. The court insisted the legislation failed to comply with its orders because it did not sufficiently fund ELL education. Pet. App. 176a. Petitioners appealed.

In an unpublished memorandum decision, the Ninth Circuit vacated the district court's prior orders. The court of appeals noted that "the landscape of educational funding has changed significantly" since 2000, and remanded for the district court to hold an evidentiary hearing on

whether changed circumstances "had a bearing on the appropriate remedy." Pet. App. 190a. Upon remand, the district court acknowledged NCLB's dramatic effect on federal and local education policy. Specifically, the district court recognized that, by "increasing the standards of accountability," NCLB "has to some extent significantly changed State educators' approach to educating students in Arizona." Pet. App. 101a. The district court likewise found that the State's Department of Education had taken seriously its role both in creating standards and in overseeing Arizona's ELL programs. Pet. App. 96a-100a. The court further acknowledged that "[t]here is no doubt" Nogales "is doing substantially better than it was in 2000." Pet. App. 99a. The district court nonetheless denied petitioners' Rule 60(b) motion. Pet. App. 115a.

The court declined to modify its injunction because, in its view, the "strides made by" Nogales were "largely" a result of its own "efforts alone." Pet. App. 100a. The court held that Arizona's significant improvements in education quality did "not establish that Arizona is fulfilling its duty to fund ELL programming rationally." Pet. App. 46a. The court further held that H.B. 2064 violated federal law because it purportedly used federal funds to "supplant" rather than "supplement" state monies. Pet. App. 113a-114a. It also determined that providing incentives for schools to teach students English within two years was unreasonable. Pet. App. 114a-115a.

Significantly, the district court's order on remand focused entirely on whether Arizona had

complied with its 2000 order requiring increased funding for ELL instruction. The district court did not consider whether, in light of admitted improvements in Arizona's programs, any student was actually denied an equal educational opportunity. It made no affirmative findings that the performance deficiencies it had noted in 2000 were still extant. And it made no specific findings that its continuing injunction was "essential to correct" any "particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712.

C. The Ninth Circuit's Decision Following Remand

Upon petitioners' appeal, the Ninth Circuit affirmed. Putting aside the legal and educational merits of the educational policy choices being unilaterally made by the district court judge, the Ninth Circuit viewed the case through a narrow procedural lens. The Ninth Circuit thus deemed it improper to grant "relief from judgment on grounds that could have been raised on appeal" from the district court's prior orders. Pet. App. 60a. In the Ninth Circuit's view, because the named defendants had not appealed the legal rulings underlying the district court's 2000 declaratory judgment, the court of appeals had no authority to re-examine the district court's "unappealed legal determinations." *Id.*; Pet. App. 51a, 68a.

According to the Ninth Circuit, to obtain relief under Rule 60(b), petitioners were required to show that the "basic factual premises of the district court's central incremental funding determination

had been swept away, or that there has been some change in legal landscape that makes the original ruling now improper." Pet. App. 63a. The court of appeals emphasized that it is insufficient "to argue for vacating the judgment because of factual or legal circumstances that have not changed the basic premises of the original rulings." *Id.* Instead, the court below required petitioners "to demonstrate either that there are no longer incremental costs associated with ELL programs in Arizona" or that Arizona had altered its funding model. *Id.*

Measured against that standard, the Ninth Circuit found that the "basic premise[]" of the district court's 2000 orders—"ELL students need extra help and that costs extra money"—had not been "swept away." Pet. App. 64a. It interpreted the "recent statewide program to *improve* ELL testing, monitoring, and support programs" as factors weighing *against* a finding of changed factual circumstances, inasmuch as those programs would impose "incremental costs on school districts." *Id.* (emphasis added). And the court below rejected petitioners' argument that focusing solely on ELL-specific funding "is no longer appropriate given general increases in education funding since 2000." Pet. App. 67a.

Finally, the Ninth Circuit concluded that Arizona's compliance with NCLB's standards and requirements did not satisfy the EEOA's "appropriate action" requirement. Pet. App. 72a-81a. Rather than seeking to harmonize the two statutes, the court of appeals focused on the differences in the statutes' purposes, and concluded

that compliance with NCLB was insufficient to satisfy the EEOA's "appropriate action" requirement. In the Ninth Circuit's view, interpreting the two statutes in harmony "would effectively repeal the EEOA by replacing its equality-based framework with the gradual remedial framework of NCLB." Pet. App. 76a.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's decision should be reversed because it fails to apply the correct standard for modifying an injunction under Rule 60(b). Instead of taking the "flexible" approach required under this Court's precedents, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992), the Ninth Circuit refused to modify the district court's injunction absent a showing that circumstances had "radically changed" and that the district court's prior judgment was "so undermined by later circumstances as to render its continued enforcement inequitable." Pet. App. 60a.

Compounding its error, the Ninth Circuit viewed federalism concerns in this case as "substantially lessened" because the former Governor and the State Board of Education "wish[ed] the injunction to remain in place." Pet. App. 52a. But what the Ninth Circuit viewed as a palliative is in fact a poison. Precisely because this litigation has served as a vehicle for certain state officials to achieve policy outcomes not attainable through ordinary democratic processes, the federal judiciary has been drawn into a highly politicized debate over sensitive questions of educational policy

Had the Ninth Circuit applied the proper Rule 60(b) standard, it would have recognized that dramatic changes in circumstances mandated vacatur of the district court's injunction. It would have recognized, as an initial matter, that the district court's funding mandates are no longer permissible under federal law in light of significant

shifts in federal education policy and the express limits that Congress imposed on remedies available under the EEOA. More fundamentally, it would have recognized that profound changes and undoubted improvements in Nogales's ELL programs establish that the district court's injunction is no longer appropriate. The evidence shows that Nogales has cured the performance deficiencies on which the district court based its original order, and it shows that Nogales is "doing an exemplary job" in providing equal educational opportunities to ELL students. JA 145-146.

2. The Ninth Circuit's decision also should be reversed because it fails to afford appropriate deference to the careful congressional policy judgments embodied in NCLB. Under well-settled precedent, because NCLB and the EEOA are embedded in the same complex statutory framework and address the same subject matter, the two statutes should be interpreted "as if they were one law." *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006); *United States v. Fausto*, 484 U.S. 439, 453 (1988). Construing the two statutes in harmony, NCLB's elaborate requirements for ELL instruction should serve as a benchmark for "appropriate action" under the EEOA. When a State complies with its NCLB obligations, it is, by definition, taking "appropriate action" for purposes of the EEOA. To read the two statutes any differently would raise grave federalism and separation-of-powers concerns.

3. In presuming to have the institutional expertise to set effective educational and budgetary policy, the Ninth Circuit stepped outside the proper

federal judicial role and intruded on the prerogatives of Arizona's local institutions. As this Court has long recognized, local control over the education of children is a vital national tradition, *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977), and unwarranted federal intrusion imposes disruptive burdens on local institutions that undermine the educational process. This Court should reverse the decision below, without occasioning a remand for further proceedings, and direct the vacatur of the district court's injunction.

ARGUMENT

I. The Ninth Circuit Misapplied The Rule 60(b) Standard.

The Ninth Circuit fell into error by applying an inflexible standard under Rule 60(b) in the context of institutional reform litigation. Because it misapplied this Court's precedent, the Ninth Circuit failed to give appropriate consideration to both the dramatic, post-2000 changes in Nogales's ELL programs and the significant shifts in federal education policy embodied in NCLB. Had it followed this Court's teachings, the Ninth Circuit would have recognized that the district court's injunction, even assuming it could be justified when entered, is no longer permissible.

A. Rule 60(b) Requires A "Flexible" Standard In The Context Of Institutional Reform Litigation.

Federal Rule of Civil Procedure 60(b) permits parties to seek relief from a federal court decree "on motion and just terms" if the application of the

decree "prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). This Court has long held that, in the context of institutional reform litigation, courts should apply a "flexible standard" when reviewing requests for relief under Rule 60(b). *Rufo*, 502 U.S. at 385. A judicial decree should be dissolved or modified if "enforcement of the decree ... would be detrimental to the public interest," *id.* at 393, or "if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Fed'n No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642, 647 (1961). In addition, a decree must be dissolved or modified if it becomes "impermissible under federal law." *Rufo*, 502 U.S. at 388. An injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *See Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991).

This requisite "flexibility" is especially appropriate in institutional reform litigation where, as here, a federal court's injunction interferes with local officials' control over local institutions. *Rufo*, 502 U.S. at 393 n.14; *Bronx Household of Faith v. Board of Educ. of City of New York*, 331 F.3d 342, 368 (2d Cir. 2002) (noting the "unbroken tradition of federal court deference ... to democratically elected state and local governments in matters concerning education"). Flexibility is required because "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Rufo*, 502 U.S. at 381 (citation

omitted). Accordingly, a federal court wielding its equitable powers to redress violations of statutory requirements is obliged to give careful consideration to any significant changes in law or factual circumstances. *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (a court "errs when it refuses to modify an injunction ... in light of such changes"). A decree seeking to force institutional reform should remain in place only as long as necessary to remedy past wrongs. *Dowell*, 498 U.S. at 247-48.

These foundational principles were recently reaffirmed in *Frew v. Hawkins*, 540 U.S. 431 (2004). There, a unanimous Court, speaking through Justice Kennedy, put the structural and democratic implications of institutional-reform injunctions at the center of its analysis. The Court emphasized that if a federal injunction is not strictly "limited to reasonable and necessary implementations of federal law," it may "improperly deprive future officials of their designated legislative and executive powers." *Id.* at 441. The Court drew upon principles of federalism and separation-of-powers, noting that these principles "require that state officials"—those with "front-line responsibility" for administering state programs in compliance with federal law—be "given latitude and substantial discretion." *Id.* at 442. *Frew* further stressed that States depend on "successor officials ... to bring new insights and solutions to problems of allocating revenues and resources." *Id.* Accordingly, if a State "establishes reason to modify" a judicial decree, "the court should make the necessary changes." *Id.*

Until the decision below, lower courts have faithfully applied the flexible standard required under this Court's precedents. *See, e.g., Building & Constr. for Trades Council of Philadelphia and Vicinity, AFL-CIO v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995); *In re Detroit Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996). These courts have understood and heeded this Court's admonition that judicial decrees must be narrowly tailored to address only "ongoing illegal activity or the past of effects of illegal activity." *Alexander v. Britt*, 89 F.3d 194, 199-200 (4th Cir. 1996); *Evans v. City of Chicago*, 10 F.3d 474, 477-79 (7th Cir. 1993). And they have recognized that respect for separation of powers, local democratic governance, and the broader public interest requires modifying a judicial decree whenever there is reason to do so. *O'Sullivan v. City of Chicago*, 396 F.3d 843, 862-63 (7th Cir. 2005) (citing *Evans*, 10 F.3d at 479-80). Faced with modification requests, federal courts are duty bound to "preserve" the interests of "democratic governance" and resolve all doubts "in favor of leeway for the political branches." *Evans*, 10 F.3d at 479.

B. The Ninth Circuit's Decision Violates This Court's Precedents.

The Ninth Circuit's decision should be reversed because it deviates significantly from this Court's doctrine and precedents. The decision is infected with at least three fundamental errors.

1. The Ninth Circuit Applied The Wrong Standard.

The Ninth Circuit applied a standard under Rule 60(b) inconsistent with the flexible approach mandated by this Court's decisions. The court of appeals refused to consider whether dissolving the injunction was in the broader public interest or whether the "original decree" could have been "issued on the state of facts that now exist." Pet. App. 51a n.31. It instead erected an almost insurmountable hurdle for modifying the district court's eight-year-old injunction.

Specifically, the court of appeals required a showing either "that the basic factual premises of the district court's" original injunction "had been swept away" or that changes in law rendered "the original ruling ... improper." Pet. App. 63a. The court thus suggested that, absent a showing that the legal or factual "landscape" had "radically changed," it would not grant relief under Rule 60(b). Pet. App. 72a. According to the Ninth Circuit, an injunction should not be modified except "in instances, *likely rare*, in which a prior judgment is *so undermined* by later circumstances as to render its continued enforcement inequitable." Pet. App. 60a (emphasis added).

The Ninth Circuit's decision, in practical effect, resurrects the standard set out in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). That daunting standard requires that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" can justify modifying a decree. *Id.* at 119. Not surprisingly, the Ninth Circuit's decision echoes approaches

taken decades ago by courts applying *Swift*. For example, the Eighth Circuit noted forty years ago that, under *Swift*, "some change is not enough" and that Rule 60(b) relief may not be granted unless "the dangers which the decree was meant to foreclose must almost have disappeared." *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 805, 813 (8th Cir. 1969).

But this Court has emphatically held that the *Swift* standard does *not* apply in the federalism-sensitive context of institutional reform litigation. *Dowell*, 498 U.S. at 247. The standard applied by the Ninth Circuit was far too "stringent." *Rufo*, 502 U.S. at 380; *see also Frew*, 540 U.S. at 441.

2. The Ninth Circuit Focused On The Wrong Considerations.

In addition to applying an erroneous standard, the Ninth Circuit's decision was contaminated by its focus on wrong considerations. The Ninth Circuit's decision suggests that federalism concerns in this case are "substantially lessened" because the former Governor of Arizona and the State Board of Education "wish[ed] the injunction to remain in place." Pet. App. 52a. The Ninth Circuit thus stressed that its ruling rested largely on procedural considerations, saying it could not grant "relief from judgment on grounds that could have been raised on appeal." Pet. App. 60a. In the court of appeals' view, a Rule 60(b) motion "may not be used to remedy a failure to contest in the first instance the legal rulings underlying the judgment." Pet. App. 51a, 68a (refusing to "reopen matters made final when the [original] [j]udgment was not appealed").

That approach is misguided. Courts have long held that a party's "consent" to an injunction—either because it fails to appeal or because it does not seek modification—is irrelevant in the context of institutional reform litigation. *Cf. Swift*, 286 U.S. at 119 (a decree may not be modified if it was entered "after years of litigation with the consent of all concerned"; courts are "not at liberty to reverse under the guise of readjusting"). If "consent" were relevant, then this Court's decisions in *Rufo* and *Frew* would have reached a different result. Both cases, after all, involved unappealed "consent" decrees.

More fundamentally, the fact that certain state officials consented to the injunction should have spurred the Ninth Circuit in the direction of heightening, as opposed to relaxing, its vigilance. *See Evans*, 10 F.3d at 478 ("democracy does not permit public officials to bind the polity forever"); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc) ("[c]ourts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority"). The Ninth Circuit's position turns a blind eye to the serious, real-world federalism concerns raised by the Arizona Attorney General's failure to mount a vigorous defense of Arizona's laws and education system. Pet. App. 28a (noting that the Attorney General and Board of Education abandoned their "defense of the suit" and argued "*against* Arizona's own law") (emphasis in original); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J.,

concurring) ("abdication of responsibility is not part of the constitutional design").

As this Court has recognized, "powerful incentives" might lead state officials "to view departures from the federal structure to be in their personal interests." *New York v. United States*, 505 U.S. 144, 182 (1992). Indeed, state officials may perversely "prefer the supervision of a federal court to confronting directly its employees and the public." *United States v. Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993). This Court has accordingly held that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 181 (1992). The fundamental "purpose served by our Government's federal structure" is not for the benefit of "public officials governing the States," but to better secure liberty. *Id.* at 181; *see also Clinton*, 524 U.S. at 450 ("[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers"). Simply put, state officials "cannot consent to the enlargement" of federal powers beyond those enumerated in, and properly exercised under, the federal Constitution. *New York*, 505 U.S. at 182; *see also Clements*, 999 F.2d at 846 ("[c]onsent is not enough when [citizens] seek to grant themselves powers they do not hold outside of court"). Here, by not vigorously defending the state's interests as a democratic polity in this litigation, the former Governor and her allies won by losing. That is, the district court's orders allowed those officials to achieve policy outcomes otherwise not attainable through democratic processes.

At the very least, the Ninth Circuit should have recognized that the consent of the named parties "cannot dispose of the valid claims of nonconsenting intervenors." *Local 93, Int'l Ass'n v. City of Cleveland*, 478 U.S. 501, 529 (1986); *Evans*, 10 F.3d at 478 (consent is irrelevant especially when "one of 'the parties' did not consent"). Critically, even assuming former Governors can bind their successors (they cannot), the fact is that the House and Senate leadership have never consented to the district court's injunction, and promptly intervened after the district court ordered the Legislature to pass legislation on threat of multi-million-dollar fines. *Cf. Martin v. Wilks*, 490 U.S. 755, 763 (1989) ("a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined"); *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (legislatures have legal interest in preserving their votes and the integrity of the legislative process). Contrary to the Ninth Circuit's assertions, the Speaker of the House and the President of the Senate intervened in these proceedings not as "individual legislators," but in their official capacity as duly appointed representatives of their respective bodies. *See* JA 80-85. Even assuming that past actions estopped other Arizona officials, the Arizona Legislature has never consented to the district court's injunction, and it deserved the chance to contest that decision on its merits.

3. The Ninth Circuit Employed The Wrong Legal Baseline.

Because the Ninth Circuit failed to apply the proper Rule 60(b) standard, it posed the wrong

question. Instead of considering whether the district court's injunction remains necessary to prevent continuing violations of federal law—that is, whether Arizona is failing to take "appropriate action" to overcome language barriers—the court of appeals focused narrowly on whether Arizona has complied with the district court's funding mandates.

The Ninth Circuit's discussion makes abundantly clear that it refused to modify the district court's injunction unless factual or legal circumstances changed the "basic premises" of the district court's "original rulings." Pet. App. 63a. In the Ninth Circuit's view, those basic premises include that "ELL students need extra help and that costs extra money." Pet. App. 69a. The Ninth Circuit thus focused its Rule 60(b) inquiry on one issue: whether Arizona has provided enough ELL-specific funding to cover all costs of ELL instruction. *Id.* (for "eight years the parties have litigated based upon that premise"); *see also id.* (if petitioners "believed that the district court erred and should have looked at all funding sources differently ... they should have appealed").

According to the Ninth Circuit, "looking to the adequacy of ELL-specific funding does not miss the forest for the trees"; rather, it "cuts to the heart of this case, which has been about such funding since 2000, when the parties dealt with the other issues in a consent decree." *Id.*; *see also* Cert. Opp. 28. The Ninth Circuit concluded that, because "[n]othing significant has changed to undermine" the district court's initial ruling, and because that ruling was not challenged on appeal, nothing

justified "relief from judgment without compliance" with the district court's order. Pet. App. 71a-72a.

Here, too, the Ninth Circuit's approach runs counter to controlling precedent. Those authorities hold that an injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *Dowell*, 498 U.S. at 247; *Frew*, 540 U.S. at 442. The district court's injunction should be implemented only so long as there is a substantial continuing violation of federal law, not simply a continuing violation of the district court's much-earlier order. *Evans*, 10 F.3d at 477-80.

Of pivotal importance in this respect, the EEOA does not mandate any particular level of ELL-specific funding. Nor does it dictate any "programs and techniques" that States and local educational authorities must "use to meet their obligations." *Castaneda*, 648 F.2d at 1009. Accordingly, because the requirement to provide earmarked ELL-specific funding for ELL programs is a creation of the Ninth Circuit's decision, not a requirement embodied in federal law, the Ninth Circuit was duty bound to consider whether, in light of various changes in Nogales's ELL programs, increased ELL-specific funding remained necessary to ensure that Nogales's ELL students receive equal educational opportunities.

To conduct the proper inquiry, the Ninth Circuit should have noted that, apart from its funding concerns, the district court's 2007 order denying relief under Rule 60(b) contains no particularized factual findings that Arizona's ELL

students are not receiving equal education opportunities. *See* 20 U.S.C. § 1703. The court below also should have considered—in light of all funding available to Nogales and with appropriate deference to state and local educational agencies—whether changes in Nogales's schools showed that Arizona was taking "appropriate action" to overcome language barriers. And, finally, even if Arizona were deemed to be not taking appropriate action, the court of appeals should have considered whether the district court's continuing injunction remained "essential to correct particular denials of equal educational opportunity." 20 U.S.C. § 1712; *Rufo*, 502 U.S. at 388 (decree must be modified if it becomes "impermissible under federal law").

C. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b).

Applying the "flexible" Rule 60(b) standard dictated by federalism and separation-of-powers concerns and mandated by this Court's decisions, Arizona is entitled to relief. Even assuming the district court's rulings were lawful when rendered, changes in fact and law have since rendered those funding-focused mandates legally impermissible.

1. Changes In Fact Require Reassessing The Injunction.

Dramatic changes in circumstances on the ground, reflecting fundamental changes in Nogales's ELL programs, confirm that the district court's injunction should not be enforced. These changes, combined with a better understanding of the need for proper incentives, make clear that the district court's funding mandates are no longer

appropriate. *See New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983) ("judicially-imposed remedies must be open to ... improvement when a better understanding of the problem emerges").

The evidence shows that Arizona has cured the specific performance deficiencies on which the district court based its original order, *see* Pet. App. 61a; that Arizona is implementing NCLB's detailed requirements for educating ELL students, *see* JA 364-376; and that, as witnesses for both sides testified below, Nogales is conducting effective ELL programs. *See* JA 228-229; *see also* JA 146.

The evidence further shows that Nogales has implemented structural reforms to employ funding efficiently and productively. It has hired more qualified teachers, *see* JA 105-107; developed an effective tutoring program, *see* JA 320-335; and substantially increased average teacher salaries. *See* JA 361-363 (salaries have increased from $29,000 in 1998 to $41,000 in 2006). As the Ninth Circuit conceded, Nogales has reduced class sizes, "improved teacher quality," fired unqualified teachers' aides, developed a uniform system of textbook and curriculum planning, and largely eliminated shortages in instructional materials. Pet. App. 35a-36a. In addition, Nogales has implemented local monitoring programs to ensure that all students, including ELL students, are meeting performance standards, *see* JA 126-128, while at the same time taking affirmative steps to eliminate wasteful, inefficient practices. *See* JA 115-116. In short, policies adopted by Nogales have "ameliorated or eliminated" the "inadequacies

discussed by the district court" in its initial 2000 order. Pet. App. 35a.

The evidence also demonstrates that Nogales has more than sufficient funds to run its ELL programs. Millions of dollars in funding that did not exist in 2000 are now flowing into Nogales's schools and its ELL programs. This funding includes "State Tutoring Fund" ($1.5 million each year) and the "AIMS Intervention/Dropout Prevent Program" ($5.2 million annually as of 2006-2007), which target underperforming and high-risk students. *See* JA 339-340. Nogales's maintenance and operating budget has increased by 34 percent from 2000 to 2007. *See* JA 215, 355. Nogales's per-student expenditures have substantially increased. *See* JA 342-360. Indeed, in some instances, Nogales has not exhausted or even applied for available funds. *See* JA 94-95, 339-340. These uncontested facts confirm the testimony of the Deputy Associate Superintendent of Arizona's Academic Achievement Division: Nogales "has the resources required to adequately fund [its] ELL programs." JA 360.

Significantly, in rejecting the request for Rule 60(b) relief, the district court did not meaningfully address these changed circumstances. The district court failed to make a single factual finding that, as of 2006, Nogales was still failing to take appropriate action to overcome language barriers that might otherwise impede access to equal educational opportunities. Pet. App. 96a-116a. Instead, the trial court relied on outdated findings, made six years earlier, and held that, in its view, the ELL-specific funding provided in H.B. 2064 was

not rationally related to the actual funding "needed to insure that ELL students could achieve mastery of the State's academic standards." *Id.* at 116a.

Because the district court made no findings addressing the factual circumstances as they then existed on the ground, the Ninth Circuit attempted to backfill the lower court's Rule 60(b) denial. *See Missouri*, 515 U.S. at 100 (criticizing court of appeals for attempting to "assemble an adequate record"). The Ninth Circuit thus combed the record below and fashioned its own assessment of record facts. But, here again, the Ninth Circuit's selective factual recitation only confirms how far the courts below have strayed beyond the proper judicial role.

The Ninth Circuit asserted, for example, that Nogales faces "significant resource constraints" and that more money would (i) help further reduce class size; (ii) make it easier to recruit fully-qualified teachers; and (iii) make it possible to hire trained teacher's aides. Pet. App. 36a. But, as noted above, sound educational theory establishes that merely increasing resources, absent proper incentives, will not necessarily result in better educational outcomes for students. *See* JA 201-202; Hanushek, *supra*, at 64, 66-69. The hard lessons of the federal courts in Kansas City teach otherwise.

More fundamentally, the simple suggestion that any school district would prefer more, as opposed to less, resources bespeaks an inadequate awareness of the real challenges confronting Arizona's schools and the flinty reality that resources are never limitless. *See* National Conference of State Legislatures, UPDATE ON STATE

BUDGET GAPS: FY2009 & FY2010, at 3 (Feb. 6, 2009); Joint Legislative Budget Committee, JOINT CAUCUS BUDGET UPDATE, at 14 (Jan. 14, 2009) (Arizona faces a $3 billion budget deficit in FY2010), *available at* http://www.azleg.gov. After all, the EEOA requires only that schools take "genuine and good faith effort[s], consistent with local circumstances *and resources*, to remedy the language deficiencies of their students." *Castaneda*, 648 F.2d at 1009 (emphasis added).

The Ninth Circuit did recognize that *reclassified* ELL students are doing as well as native English speakers, cheerily characterizing this as a "clear bright spot" in Arizona's performance. Pet. App. 41a. Rightly so. Record evidence shows that, in many respects, reclassified ELL students are outperforming native English-speaking students. *See* JA 191 (reclassified students outperform native English speakers on standardized math tests); JA 97 (90 percent of reclassified students passed standardized AIMS test, as compared to 68 percent statewide average). The Ninth Circuit nonetheless complained that students who remain in Arizona's ELL programs "fall behind the district average for all students." Pet. App. 39a. It also noted that "lower grade[]" ELL students are performing "substantially better than ELL students in higher grades." Pet. App. 38a.

But these observations are utterly irrelevant to the issue whether local officials responsible for administering Nogales's ELL programs are satisfying their EEOA obligations. It is commonsense that, on average, ELL students who

are still learning English will not perform as well on standardized tests (written in English) as students who have already attained English proficiency. Likewise, the fact that older ELL students do not perform as well as younger ELL students confirms the Legislature's desire to create proper incentives to prevent students from languishing in ELL programs. *See* JA 204-205. Neither observation says anything meaningful about whether the local educational agency is taking appropriate action, "consistent with local circumstances and resources," to overcome language barriers. *Castaneda*, 648 F.2d at 1009.

Had the court below compared Nogales's ELL students to their ELL peers in other districts, the panel would have recognized that Nogales's ELL programs are ahead of the curve. Arizona ranked 628 schools based on their 2005 performance on standardized tests. Nogales placed four schools in the top ten and five in the top fifty. *See* Pet. App. 363a-366a. As recently as 2006, Nogales outscored other districts with high ELL populations at almost every grade level. *See* JA 336-338. For example, 63 percent of Nogales's ELL students passed third-grade reading as compared to 31 percent of ELL students statewide. *Id.* Similarly, 25 percent of Nogales ELL students passed tenth-grade writing as compared to 13 percent of ELL students statewide. *Id.*

In short, no one disputes the truism that there is always something different that might be done to help ELL students overcome language barriers. But that is decidedly not the question that should have engaged the courts below. The question,

rather, is whether the actions of Nogales school officials could justify a continuing federal court injunction mandating dramatic increases in ELL-specific funding. The lack of any findings on that critical issue, the overwhelming evidence that Nogales's schools are conducting effective ELL programs, and the substantial funding increases Nogales's ELL programs have experienced over the past six years all confirm that circumstances have changed. The district court's injunction, in sum, is no longer required or permissible.

2. Changes In Law Require Reassessing The Injunction.

Because a district court injunction may not seek to eliminate a condition that does not violate federal law or "flow from such a violation," *Dowell*, 498 U.S. at 247, an injunction should be withdrawn upon request if a subsequently-enacted statute brings a party into compliance with governing law. *See David B. v. McDonald*, 116 F.3d 1146, 1149-50 (7th Cir. 1997); *Ferrell v. HUD*, 186 F.3d 805, 813-14 (7th Cir. 1999). As this Court has emphasized, a "consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Rufo*, 502 U.S. at 388. Moreover, even if an injunction does not technically violate federal law, modification is in order if, in light of changes in federal policy, its continued enforcement "would be detrimental to the public interest." *Id.* at 384.

Significant changes in the operative legal framework have left the district court's outdated funding mandates at war with current statutory

policies; contrary to the broader public interest; and impermissible as a matter of law. *See Wright*, 364 U.S. at 651 (court decree should be modified when "a change in law" brings the decree in "conflict with statutory objectives"). In particular, the district court's injunction raises grave concerns posed by "federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law." *Frew*, 540 U.S. at 441. Because court-mandated increases in funding are not an "appropriate" approach for reforming schools, the district court's injunction is no longer in the public interest.

II. Congressionally Mandated Requirements For ELL Instruction Set A Benchmark For "Appropriate Action" Under The EEOA.

NCLB invigorates the EEOA by setting out detailed, objective requirements that courts can employ in determining whether state policymakers are taking "appropriate action." Instead of construing those two sets of amendments to the same underlying statute—the ESEA—in harmony, the Ninth Circuit read them in isolation. By virtue of this interpretive approach, the court below imposed requirements on Arizona that contravene Congress's careful policy judgments.

A. Statutes Addressing The Same Subject Matter Should Be Interpreted In Harmony.

Under settled principles of statutory construction, courts should "begin with the language employed by Congress" and assume "that the ordinary meaning of that language accurately

expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quotation omitted). The words of a statute "must be read" in "context and with a view to their place in the overall statutory scheme." *Doe v. Chao*, 540 U.S. 614, 630 (2004) (citation omitted). Because statutory construction is a "holistic endeavor," it must "account for a statute's full text," as well as its "structure" and "subject matter." *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

1. Complying With NCLB's Detailed Requirements Is "Appropriate."

In adding the 1974 EEOA amendments to the ESEA, Congress provided "almost no guidance, in the form of text or legislative history," to assist in determining whether a local educational agency is taking "appropriate action to overcome language barriers." *Castaneda*, 648 F.2d at 1007. Congress instead enacted an elastic standard, requiring courts to determine what is "appropriate," in light of experience and evolving understandings, with deference to the expertise and prerogatives of local officials. *See id.*

A generation later, in enacting further amendments to the ESEA in the comprehensive 2002 NCLB legislation, Congress was undoubtedly aware that the provisions and purposes of NCLB "would have to coexist" with those of pre-existing ESEA statutes, including the EEOA. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (superseded by statute on other grounds). Congress hardly could have thought otherwise. An entire title of NCLB,

with multiple parts and subparts, sets forth elaborate requirements for ensuring that States take action to ensure that ELL students attain English proficiency and receive the same educational opportunities as other students. *See* 20 U.S.C. §§ 6812, 6823 (local agencies must ensure that ELL students meet the "same challenging State academic content and student academic achievement standards as all children are expected to meet"). The later, more specific, more targeted requirements of NCLB should inform, and not be overridden by, the earlier, more general, more open-ended mandate of the EEOA. *See Hinck v. United States*, 127 S. Ct. 2011, 2015 (2007) ("'a precisely drawn, detailed statute pre-empts more general remedies'"); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

The plain, everyday understanding of the term "appropriate action" undoubtedly encompasses action required under a related statute covering the same subject matter. *See Lopez v. Gonzales*, 549 U.S. 47, 53-54 (2006) (when Congress has not defined a term, "everyday understanding[s] ... should count for a lot"). Not surprisingly, in interpreting the EEOA, courts have not hesitated to examine other amendments to the ESEA as guides to discerning Congress's intent. In *Castaneda*, for example, the Fifth Circuit examined the Bilingual Education Act as providing guidance to the EEOA's proper interpretation. *See Castaneda*, 684 F.2d at 1009.

This holistic interpretive approach is especially appropriate here, where the two statutes at issue are embedded within the same complex statutory framework. Under well-settled principles, the two should be read "'as if they were one law.'" *Wachovia Bank*, 546 at 315-16 (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)). As this Court has long recognized, when "several acts of Congress are passed, touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Marchie Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911); *see also FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 143 (2000) (subsequent acts may "shape or focus" meanings of earlier statutes); *Fausto*, 484 U.S. at 453.

These long-established principles are further reinforced where, as here, Congress has fashioned a detailed regulatory scheme designed to achieve a delicate balance of competing regulatory objectives. *See Verizon Commn'cs Inc. v. Trinko*, 540 U.S. 398, 412-16 (2004) (regulatory framework under the Telecommunications Act informs proper enforcement of antitrust laws). The congressionally-ordained balance would be disrupted if courts were to interpret the EEOA's open-ended command of "appropriate action" to impose obligations on local educational officials that contradict—and, hence, are not appropriate under—NCLB. *Cf. Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001) (because authority granted to administrator sought to achieve "a somewhat delicate balance of statutory

objectives," courts should not impose common-law liability).

2. Courts May Not Grant Remedies Under The EEOA That Conflict With Congressional Policies.

Even if NCLB does not inform the substantive meaning of the EEOA's "appropriate action" requirement, courts nonetheless lack discretion to grant relief inconsistent with the policies embodied in NCLB. The EEOA itself prohibits remedies not "essential" to correcting "particular" denials of equal educational opportunity. 20 U.S.C. § 1712.

This Court's jurisprudence recognizes that, as a matter of separation of powers, "Congress rather than the courts controls the availability of remedies for violations of statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 773 (2008) (citation omitted). The "breadth" of a private right of action "should not, as a general matter, grow beyond the scope congressionally intended." *Id.* (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104-1105 (1991)). Under bedrock principles, the decision to extend a cause of action —or to create additional remedies—is one entrusted to Congress, not the judiciary. *See id.*

It is therefore significant that Congress carefully circumscribed the remedies available to cure EEOA violations. *See Morgan v. Kerrigan*, 530 F.2d 401, 412-13 (1st Cir. 1976) (the EEOA was designed to "guide and channel" the exercise of judicial power). The statute mandates that, in "formulating a remedy for a denial of equal educational opportunity," a court "shall seek or

impose *only* such remedies as are *essential* to correct *particular* denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added); *Morgan*, 530 F.2d at 413 (EEOA requires "less restrictive means"). Congress specified eight (and only eight) available remedies for curing EEOA violations. In doing so, the Article I branch directed courts to "consider and make specific findings on the efficacy" of each of the specified remedies, individually and in combination, "in correcting" any particular denial of statutory rights. 20 U.S.C. § 1713. The first seven remedies involve assigning students to schools, transferring students to different schools, revising grade structures, constructing new schools, or closing old ones. *Id.* § 1713(a)-(f). The final remedy permits courts to order "the development and implementation of any other plan which is educationally sound and administratively feasible." *Id.* § 1713(g). That remedy may not be imposed, however, unless local officials are first afforded a "reasonable opportunity" to develop their own "voluntary remedial plan." *Id.* § 1758.

The EEOA's specified remedies are significant because they establish that, as a matter of law, so long as state officials are taking the specific actions NCLB requires to provide equal educational opportunities, any additional programmatic, *state-wide* remedy is not "essential." *Id.* § 1712. NCLB requires a State, in consultation with local educational agencies, education-related community groups, parents, teachers, school administrators, and researchers, to develop a plan to ensure that ELL students are able to achieve the same

academic standards that all children are expected to meet. *See id.* § 6812, § 6823(b)(3), (5), § 6826(d). This plan must hold local schools and agencies "accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring ... demonstrated improvements" in English proficiency and "adequate yearly progress." *Id.* § 6812(8).

It follows that in all cases where a State's NCLB plan, developed in conjunction with the local community and educational experts, is approved by the Department of Education, *see id.* § 6823(c), courts have no warrant for invoking a more elastic standard under a much older statute to displace NCLB's requirements. In such circumstances, because the NCLB-approved plan requires the State to ensure equal educational opportunities, the remedy of an additional, potentially conflicting court-fashioned plan is not "essential." Indeed, the expertise, flexibility, and multiple layers of scrutiny built into NCLB's elaborate methodology make it far more likely to achieve reliable and effective educational policies than individual federal courts relegated to defining "appropriate action" through the vagaries of case-by-case litigation.

B. The Ninth Circuit's Approach Cannot Be Squared With Applicable Statutory Requirements.

The Ninth Circuit concluded that, although Congress enacted an entire title of NCLB focused on ELL instruction, those congressional policies are irrelevant to interpreting section 1703(f). The

stated reason: the two statutes purportedly serve "distinct purposes." Pet. App. 72a-73a. In the Ninth Circuit's view, because the EEOA demands "objective, immediate equalization of educational opportunities," Pet. App. 74a, interpreting the EEOA's "appropriate action" requirement in light of NCLB would "effectively repeal the EEOA by replacing its equality-based framework with a gradual remedial framework of NCLB." Pet. App. 76a; *see also* Pet. App. 74a (NCLB "does not deal in the immediate, rights-based framework inherent in civil rights law"). These conclusions are deeply flawed.

The Ninth Circuit's approach drives an unwarranted (and unnecessary) wedge between the EEOA and NCLB. Contrary to the Ninth Circuit's suggestions, nothing in section 1703(f) sets "immediate equalization of educational opportunities" as an objective. Instead, echoing the anthem of the civil rights movement, the statutory language—requiring appropriate action to "*overcome*" language barriers—suggests that the struggle for equal educational opportunities is not necessarily expected to produce immediate, once-for-all-times success. *See Engine Mfrs. Ass'n*, 541 U.S. at 252 (statutory construction should "begin with the language employed by Congress"). Far from requiring "immediate equalization of educational opportunities," the EEOA's stated purpose is to "specify appropriate remedies for the *orderly* removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b) (emphasis added); *see* THE COMPACT OXFORD ENGLISH DICTIONARY 1223 (2d ed. 2000) (orderly: "in due order or regular

succession"). The 1970s-era statute thus recognizes that overcoming language barriers will take time. Under the EEOA, moreover, court-ordered remediation plans may not be imposed until the local agency is provided notice "and given a reasonable opportunity to develop a voluntary remedial plan," with sufficient "time" to enlist "community participation." 20 U.S.C. § 1758. The 1974 statute is not, in short, a rigid mandate; instead, it requires schools to make "a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Castaneda*, 648 F.2d at 1009.

The Ninth Circuit is likewise wrong in conceptualizing the two statutes as serving "different purposes." To the contrary, the relevant portions of NCLB and the EEOA both focus on the same underlying objective: ensuring educational opportunities for students not proficient in English. *Compare* 20 U.S.C. § 1703(f) *with* 20 U.S.C. § 6812(2). NCLB thus defines the appropriate steps that States must follow to ensure that ELL students are given the same opportunities as non-ELL students. The statute is expressly designed to ensure that "all limited English proficient children" receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." *Id.* § 6812(2). NCLB thus has the same "equality-based" focus as the EEOA. Indeed, commentators have suggested that NCLB is the "greatest civil rights education

statute that has ever been passed." *Not Getting Left Behind*, WASH. POST, Feb. 5, 2006, at B-06 (quoting John Brattain, Chief Counsel for the Lawyers' Committee for Civil Rights Under Law).

Nor does interpreting the two statutes in harmony impliedly repeal the EEOA or otherwise render it a dead letter. The "task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *Fausto*, 484 U.S. at 453

So it is here. The EEOA remains a vital protection against civil rights violations. The EEOA's prohibitions against discrimination, deliberate segregation, and forced busing remain largely (if not entirely) unaffected by NCLB. *See* 20 U.S.C. § 1703(a)-(e). Moreover, situations may well arise where, although a State is in compliance with NCLB's mandates, particular schools or school districts engage in individual instances of discrimination for which a court-ordered remedy under the EEOA is "essential" to correct a "particular denial[] of equal educational opportunity." *Id.* § 1712.

But that is far from saying courts may write state-wide remedies on the blank slate of the EEOA's "appropriate action" mandate and in defiance of NCLB's particularized requirements. *See United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1997) (a "specific policy embodied in a later federal statute should control our construction" of a more general, earlier statute). As

long as a State adheres to NCLB's requirements, it does *not* commit an EEOA violation merely because it chooses not to allocate more taxpayer dollars to programs that are already meeting the detailed federal standards that Congress has chosen to enact. Federal courts lack authority to second-guess Congress's judgment as to what is "appropriate," or to proceed by their own lights and mandate sweeping, state-wide funding increases that contravene NCLB's policies favoring flexibility, accountability, and educational outcomes over judicial management, divided control, and funding inputs.

C. The Ninth Circuit's Approach Contravenes Congress's Policy Judgments.

In failing to consider NCLB as a benchmark for "appropriate action," the Ninth Circuit violated the fundamental principle that "legislative not judicial solutions are preferable" in areas where, as here, Congress enjoys superior institutional competence. *Patsy v. Board of Regents*, 457 U.S. 496, 513 (1982). As this Court has emphasized, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). By focusing on the EEOA's principal purpose, the Ninth Circuit neglected Congress's other objectives, including its intent to leave "state and local educational authorities a substantial

amount of latitude in choosing the programs and techniques" appropriate "to meet their obligations under the EEOA." *Castaneda*, 648 F.2d at 1009.

Had it properly applied this Court's precedent, the Ninth Circuit would have recognized that the district court's myopic focus on increased funding rests on an antiquated educational theory that runs contrary to Congress's policy judgments.

First, the continuing injunction directly contravenes Congress's policy that state and local officials be given flexibility to implement ELL programs they believe are "most effective." 20 U.S.C. § 6812(9). The lower court's view that Arizona's educational successes will be "fleeting at best" (unless the State commits substantially more taxpayer dollars earmarked for ELL instruction) is precisely the type of judicial micro-management that has failed to improve student performance. *See Missouri*, 515 U.S. at 131 ("[f]ederal courts do not possess the capabilities of state and local governments in addressing educational problems"). The reality is this: educational opportunities will not necessarily improve merely because more dollars are spent. *See* JA 202. Instead, structuring program funding is an essential component of sound education policies. Local officials must be given proper incentives to ensure that dollars are spent wisely. *See Castaneda*, 648 F.2d at 1009 (courts may not "choos[e] between sound but competing theories").

Second, the continuing injunction cannot be reconciled with Congress's decision that the federal government should get out of the business of

dictating specific programmatic inputs and, instead, focus on whether students are achieving objective, measurable educational outcomes. The courts below acknowledged that Nogales's schools have substantially improved, but discounted those improvements by attributing them to the efforts of former Superintendent Kelt Cooper. Pet. App. 36a (noting that he was "able to achieve his reforms with limited resources"); Pet. App. 62a (Nogales "should not be penalized for doing its best to make do"). That dismissive attitude spotlights petitioners' profound disagreement with the courts below. In petitioners' view, educational leadership that wisely deploys available resources is to be celebrated not discounted. Superintendent Cooper improved Nogales's schools by addressing the "shell game" in which schools claim resources they do not need in order to create "built-in slush fund[s]." JA 111-113. He therefore agreed that, before one "can even begin to suggest that money might make a difference," schools must be "clean[ed] up" and turned into "highly managed" and "highly efficient" organizations. JA 122-124 (describing persistent inefficiencies as "parasite[s]" that drain "away resources"). In sum, proper incentives for marshalling resources creates an educational culture of competence that propels rather than retards student achievement.

Third, the continuing injunction cannot be reconciled with Congress's policy determination to meet educational challenges through the structures of the modern administrative state, and its recognition that judges' attempts to dictate preferred policy outcomes are not appropriate. This

structural point is underscored by the Ninth Circuit's narrow understanding of the difficulties involved in creating effective ELL programs. Both the district court and the Ninth Circuit noted a concern that the costs of ELL programming are not fully covered by ELL-specific funds (group B funding) and, therefore, assumed that Nogales must be "dipping into funds that would otherwise be used to fund basic educational purposes." Pet. App. 42a. But that contention overlooks the discretionary nature of group B funding and the fact that schools are not required to spend all group B monies on ELL education. Because group B funds are provided based on the number of students participating in ELL programs, a dramatic increase in group B funds could create perverse incentives for schools to keep ELL students languishing in special-language programs. *See* JA 204-205.

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools.

The lower courts have stepped outside the proper federal judicial role and, in presuming "to have the institutional ability to set effective educational" and "budgetary" policy, have transformed the judiciary from "the least dangerous branch into the most dangerous one." *Missouri*, 515 U.S. at 132. To draw this long intrusion into the prerogatives of Arizona's local officials to a close, this Court should vacate the district court's injunction without remanding for further proceedings.

It is undisputed that the district court's funding mandate provides the *only* basis for its

continuing injunction. Pet. App. 69a; Cert. Opp. 28. Because the district court's funding mandate is unlawful, the injunction should be vacated without occasioning a remand for further proceedings. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2745 (2008) (remand not appropriate if it would be "an idle and useless formality"). Moreover, even if the district court's funding mandate were not invalid as a matter of law, the factual record is adequate to resolve the issues on review. *See Thigpen v. Roberts*, 468 U.S. 27, 32 (1984). The extensive record evidence establishes that Arizona is taking appropriate action to overcome language barriers. In addition, the Department of Education can remedy any failures to comply with federal law; thus, no additional judicial remedy is "essential." 20 U.S.C. § 1712.

Further litigation at this juncture would mostly serve to impose unnecessary burdens on Arizona's schools, sapping the energy and flexibility of school administrators and further draining the public fisc in a period of strained finances. *See Missouri*, 515 U.S. at 131. As this Court has long recognized, "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Dowell*, 498 U.S. at 248. Local autonomy of "school districts is a vital national tradition." *Dayton*, 433 U.S. at 410. Because local autonomy is "essential both to the maintenance of community concern and support for public schools and to the quality of the educational process," it is hard to discern how much damage

has been caused by the district court's invasive (and expensive) approach. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). After eight long years, however, it is clear that no justification exists for continuing the judiciary's intrusion into Arizona's local institutions.

In the end, this case boils down to the fact that the courts below remain mired in the past. Continuing to rely on outdated notions of education reform, the lower courts hark back to an era when well-meaning officials blindly threw scarce resources at problems, but then did little to ensure commensurate (or any) improvements in student performance. Arizona's Legislature is resisting this entrenched thinking that demands additional financial resources, but is unwilling to require accountability or make difficult policy choices—the leadership needed to inspire and serve Arizona's schoolchildren. The appropriate actions that Arizona has taken over the last eight years to aid its non-English-speaking students should be given a chance to succeed.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision below and direct the vacatur of the district court's injunction.

Respectfully submitted,

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February 19, 2009

ADDENDUM

TABLE OF CONTENTS

Fed. R. Civ. P. 60(b) Add-2
20 U.S.C. § 1703 ..... Add-3
20 U.S.C. § 1712 ..... Add-4
20 U.S.C. § 1713 ..... Add-5
20 U.S.C. § 1758 ..... Add-6
20 U.S.C. § 6311 ..... Add-7
20 U.S.C. § 6812 ..... Add-44
20 U.S.C. § 6842 ..... Add-47

Federal Rules of Civil Procedure

Rule 60. Relief from a Judgment or Order

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

1. mistake, inadvertence, surprise, or excusable neglect;

2. newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

3. fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

4. the judgment is void;

5. the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

6. any other reason that justifies relief.

* * *

20 U.S.C. § 1703

§ 1703. Denial of equal education opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

* * *

20 U.S.C. § 1712

§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws

* * *

20 U.S.C. § 1713

§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

* * *

20 U.S.C. § 1758

§ 1758. Reasonable time for developing voluntary school desegregation plans following detailed notice of violations

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

* * *

20 U.S.C. § 6311

§ 6311. State Plans

(a) Plans required

(1) In general

For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary a plan, developed by the State educational agency, in consultation with local educational agencies, teachers, principals, pupil services personnel, administrators (including administrators of programs described in other parts of this subchapter), other staff, and parents, that satisfies the requirements of this section and that is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act, the Carl D. Perkins Career and Technical Education Act of 2006, the Head Start Act, the Adult Education and Family Literacy Act, and the McKinney-Vento Homeless Assistance Act.

(2) Consolidated plan

A State plan submitted under paragraph (1) may be submitted as part of a consolidated plan under section 7842 of this title.

(b) Academic standards, academic assessments, and accountability

(1) Challenging academic standards

(A) In general

Each State plan shall demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the

State, its local educational agencies, and its schools to carry out this part, except that a State shall not be required to submit such standards to the Secretary.

(B) Same standards

The academic standards required by subparagraph (A) shall be the same academic standards that the State applies to all schools and children in the State.

(C) Subjects

The State shall have such academic standards for all public elementary school and secondary school children, including children served under this part, in subjects determined by the State, but including at least mathematics, reading or language arts, and (beginning in the 2005-2006 school year) science, which shall include the same knowledge, skills, and levels of achievement expected of all children.

(D) Challenging academic standards

Standards under this paragraph shall include—

(i) challenging academic content standards in academic subjects that—

(I) specify what children are expected to know and be able to do;

(II) contain coherent and rigorous content; and

(III) encourage the teaching of advanced skills; and

(ii) challenging student academic achievement standards that—

(I) are aligned with the State's academic content standards;

(II) describe two levels of high achievement (proficient and advanced) that determine how well children are mastering the material in the State academic content standards; and

(III) describe a third level of achievement (basic) to provide complete information about the progress of the lower-achieving children toward mastering the proficient and advanced levels of achievement.

(E) Information

For the subjects in which students will be served under this part, but for which a State is not required by subparagraphs (A), (B), and (C) to develop, and has not otherwise developed, such academic standards, the State plan shall describe a strategy for ensuring that students are taught the same knowledge and skills in such subjects and held to the same expectations as are all children.

(F) Existing standards

Nothing in this part shall prohibit a State from revising, consistent with this section, any standard adopted under this part before or after January 8, 2002.

(2) Accountability

(A) In general

Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational

agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph. Each State accountability system shall—

(i) be based on the academic standards and academic assessments adopted under paragraphs (1) and (3), and other academic indicators consistent with subparagraph (C)(vi) and (vii), and shall take into account the achievement of all public elementary school and secondary school students;

(ii) be the same accountability system the State uses for all public elementary schools and secondary schools or all local educational agencies in the State, except that public elementary schools, secondary schools, and local educational agencies not participating under this part are not subject to the requirements of section 6316 of this title; and

(iii) include sanctions and rewards, such as bonuses and recognition, the State will use to hold local educational agencies and public elementary schools and secondary schools accountable for student achievement and for ensuring that they make adequate yearly progress in accordance with the State's definition under subparagraphs (B) and (C).

(B) Adequate yearly progress

Each State plan shall demonstrate, based on academic assessments described in paragraph (3), and in accordance with this paragraph, what constitutes adequate yearly progress of the State, and of all public elementary schools, secondary schools, and local educational agencies in the State,

toward enabling all public elementary school and secondary school students to meet the State's student academic achievement standards, while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools.

(C) Definition

"Adequate yearly progress" shall be defined by the State in a manner that—

(i) applies the same high standards of academic achievement to all public elementary school and secondary school students in the State;

(ii) is statistically valid and reliable;

(iii) results in continuous and substantial academic improvement for all students;

(iv) measures the progress of public elementary schools, secondary schools and local educational agencies and the State based primarily on the academic assessments described in paragraph (3);

(v) includes separate measurable annual objectives for continuous and substantial improvement for each of the following:

(I) The achievement of all public elementary school and secondary school students.

(II) The achievement of—

(aa) economically disadvantaged students;

(bb) students from major racial and ethnic groups;

(cc) students with disabilities; and

(dd) students with limited English proficiency;

except that disaggregation of data under subclause (II) shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(vi) in accordance with subparagraph (D), includes graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years) and at least one other academic indicator, as determined by the State for all public elementary school students; and

(vii) in accordance with subparagraph (D), at the State's discretion, may also include other academic indicators, as determined by the State for all public school students, measured separately for each group described in clause (v), such as achievement on additional State or locally administered assessments, decreases in grade-to-grade retention rates, attendance rates, and changes in the percentages of students completing gifted and talented, advanced placement, and college preparatory courses.

(D) Requirements for other indicators

In carrying out subparagraph (C)(vi) and (vii), the State—

(i) shall ensure that the indicators described in those provisions are valid and reliable, and are

consistent with relevant, nationally recognized professional and technical standards, if any; and

(ii) except as provided in subparagraph (I)(i), may not use those indicators to reduce the number of, or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring under section 6316 of this title if those additional indicators were not used, but may use them to identify additional schools for school improvement or in need of corrective action or restructuring.

(E) Starting point

Each State, using data for the 2001-2002 school year, shall establish the starting point for measuring, under subparagraphs (G) and (H), the percentage of students meeting or exceeding the State's proficient level of academic achievement on the State assessments under paragraph (3) and pursuant to the timeline described in subparagraph (F). The starting point shall be, at a minimum, based on the higher of the percentage of students at the proficient level who are in—

(i) the State's lowest achieving group of students described in subparagraph (C)(v)(II); or

(ii) the school at the 20th percentile in the State, based on enrollment, among all schools ranked by the percentage of students at the proficient level.

(F) Timeline

Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002

school year, all students in each group described in subparagraph (C)(v) will meet or exceed the State's proficient level of academic achievement on the State assessments under paragraph (3).

(G) Measurable objectives

Each State shall establish statewide annual measurable objectives, pursuant to subparagraph (C)(v), for meeting the requirements of this paragraph, and which—

(i) shall be set separately for the assessments of mathematics and reading or language arts under subsection (a)(3);

(ii) shall be the same for all schools and local educational agencies in the State;

(iii) shall identify a single minimum percentage of students who are required to meet or exceed the proficient level on the academic assessments that applies separately to each group of students described in subparagraph (C)(v);

(iv) shall ensure that all students will meet or exceed the State's proficient level of academic achievement on the State assessments within the State's timeline under subparagraph (F); and

(v) may be the same for more than 1 year, subject to the requirements of subparagraph (H).

(H) Intermediate goals for annual yearly progress

Each State shall establish intermediate goals for meeting the requirements, including the measurable objectives in subparagraph (G), of this paragraph and that shall—

(i) increase in equal increments over the period covered by the State's timeline under subparagraph (F);

(ii) provide for the first increase to occur in not more than 2 years; and

(iii) provide for each following increase to occur in not more than 3 years.

(I) Annual improvement for schools

Each year, for a school to make adequate yearly progress under this paragraph—

(i) each group of students described in subparagraph (C)(v) must meet or exceed the objectives set by the State under subparagraph (G), except that if any group described in subparagraph (C)(v) does not meet those objectives in any particular year, the school shall be considered to have made adequate yearly progress if the percentage of students in that group who did not meet or exceed the proficient level of academic achievement on the State assessments under paragraph (3) for that year decreased by 10 percent of that percentage from the preceding school year and that group made progress on one or more of the academic indicators described in subparagraph (C)(vi) or (vii); and

(ii) not less than 95 percent of each group of students described in subparagraph (C)(v) who are enrolled in the school are required to take the assessments, consistent with paragraph (3)(C)(xi) and with accommodations, guidelines, and alternative assessments provided in the same manner as those provided under section

612(a)(16)(A) of the Individuals with Disabilities Education Act [20 U.S.C. 1412(a)(16)(A)] and paragraph (3), on which adequate yearly progress is based (except that the 95 percent requirement described in this clause shall not apply in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student).

(J) Uniform averaging procedure

For the purpose of determining whether schools are making adequate yearly progress, the State may establish a uniform procedure for averaging data which includes one or more of the following:

(i) The State may average data from the school year for which the determination is made with data from one or two school years immediately preceding that school year.

(ii) Until the assessments described in paragraph (3) are administered in such manner and time to allow for the implementation of the uniform procedure for averaging data described in clause (i), the State may use the academic assessments that were required under paragraph (3) as that paragraph was in effect on the day preceding January 8, 2002, provided that nothing in this clause shall be construed to undermine or delay the determination of adequate yearly progress, the requirements of section 6316 of this title, or the implementation of assessments under this section.

(iii) The State may use data across grades in a school.

(K) Accountability for charter schools

The accountability provisions under this chapter shall be overseen for charter schools in accordance with State charter school law.

(3) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part relating to science assessments until the beginning of the 2007-2008 school year.

(B) Use of assessments

Each State educational agency may incorporate the data from the assessments under this paragraph into a State-developed longitudinal data system that links student test scores, length of enrollment, and graduation records over time.

(C) Requirements

Such assessments shall—

(i) be the same academic assessments used to measure the achievement of all children;

(ii) be aligned with the State's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards;

(iii) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards;

(iv) be used only if the State educational agency provides to the Secretary evidence from the test publisher or other relevant sources that the assessments used are of adequate technical quality for each purpose required under this chapter and are consistent with the requirements of this section, and such evidence is made public by the Secretary upon request;

(v) (I) except as otherwise provided for grades 3 through 8 under clause vii, measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(II) beginning not later than school year 2007-2008, measure the proficiency of all students in science and be administered not less than one time during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding;

(vii) beginning not later than school year 2005-2006, measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of the academic assessments by that deadline and that the State will complete implementation within the additional 1-year period;

(viii) at the discretion of the State, measure the proficiency of students in academic subjects not described in clauses (v), (vi), (vii) in which the State has adopted challenging academic content and academic achievement standards;

(ix) provide for—

(I) the participation in such assessments of all students;

(II) the reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act [20 U.S.C. 1401(3)]) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards; and

(III) the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency as determined under paragraph (7);

(x) notwithstanding subclause (III), the academic assessment (using tests written in English) of reading or language arts of any student who has attended school in the United States (not including Puerto Rico) for three or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed two additional consecutive years, provided that such

student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests (written in English) of reading or language arts;

(xi) include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, except that the performance of students who have attended more than 1 school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency;

(xii) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii) that allow parents, teachers, and principals to understand and address the specific academic needs of students, and include information regarding achievement on academic assessments aligned with State academic achievement standards, and that are provided to parents, teachers, and principals, as soon as is practicably possible after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xiii) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students

who are not economically disadvantaged, except that, in the case of a local educational agency or a school, such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(xiv) be consistent with widely accepted professional testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information; and

(xv) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items.

(D) Deferral

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to January 8, 2002, for 1 year for each year for which the amount appropriated for grants under section 7301b(a)(2) of this title is less than—

(i) $370,000,000 for fiscal year 2002;

(ii) $380,000,000 for fiscal year 2003;

(iii) $390,000,000 for fiscal year 2004; and

(iv) $400,000,000 for fiscal years 2005 through 2007.

(4) Special rule

Academic assessment measures in addition to those in paragraph (3) that do not meet the requirements of such paragraph may be included in the assessment under paragraph (3) as additional measures, but may not be used in lieu of the academic assessments required under paragraph (3). Such additional assessment measures may not be used to reduce the number of or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring under section 6316 of this title if such additional indicators were not used, but may be used to identify additional schools for school improvement or in need of corrective action or restructuring except as provided in paragraph (2)(I)(i).

(5) State authority

If a State educational agency provides evidence, which is satisfactory to the Secretary, that neither the State educational agency nor any other State government official, agency, or entity has sufficient authority, under State law, to adopt curriculum content and student academic achievement standards, and academic assessments aligned with such academic standards, which will be applicable to all students enrolled in the State's public elementary schools and secondary schools, then the State educational agency may meet the requirements of this subsection by—

(A) adopting academic standards and academic assessments that meet the requirements of this

subsection, on a statewide basis, and limiting their applicability to students served under this part; or

(B) adopting and implementing policies that ensure that each local educational agency in the State that receives grants under this part will adopt curriculum content and student academic achievement standards, and academic assessments aligned with such standards, which—

(i) meet all of the criteria in this subsection and any regulations regarding such standards and assessments that the Secretary may publish; and

(ii) are applicable to all students served by each such local educational agency.

(6) Language assessments

Each State plan shall identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student academic assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages, but shall not mandate a specific academic assessment or mode of instruction.

(7) Academic assessments of English language proficiency

Each State plan shall demonstrate that local educational agencies in the State will, beginning not later than school year 2002-2003, provide for an

annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period.

(8) Requirement

Each State plan shall describe—

(A) how the State educational agency will assist each local educational agency and school affected by the State plan to develop the capacity to comply with each of the requirements of sections 6312(c)(1)(D), 6314(b), and 6315(c) of this title that is applicable to such agency or school;

(B) how the State educational agency will assist each local educational agency and school affected by the State plan to provide additional educational assistance to individual students assessed as needing help to achieve the State's challenging academic achievement standards;

(C) the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 6314(b)(1)(C) and 6315(c)(1)(E) of this title, including steps that the State educational

agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps;

(D) an assurance that the State educational agency will assist local educational agencies in developing or identifying high-quality effective curricula aligned with State academic achievement standards and how the State educational agency will disseminate such curricula to each local educational agency and school within the State; and

(E) such other factors the State educational agency determines appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging academic content standards adopted by the State.

(9) Factors affecting student achievement

Each State plan shall include an assurance that the State educational agency will coordinate and collaborate, to the extent feasible and necessary as determined by the State educational agency, with agencies providing services to children, youth, and families, with respect to local educational agencies within the State that are identified under section 6316 of this title and that request assistance with addressing major factors that have significantly affected the academic achievement of students in the local educational agency or schools served by such agency.

(10) Use of academic assessment results to improve student academic achievement

Each State plan shall describe how the State educational agency will ensure that the results of the State assessments described in paragraph (3)—

(A) will be promptly provided to local educational agencies, schools, and teachers in a manner that is clear and easy to understand, but not later than before the beginning of the next school year; and

(B) be used by those local educational agencies, schools, and teachers to improve the educational achievement of individual students.

(c) Other provisions to support teaching and learning

Each State plan shall contain assurances that—

(1) the State educational agency will meet the requirements of subsection (h)(1) and, beginning with the 2002-2003 school year, will produce the annual State report cards described in such subsection, except that the Secretary may provide the State educational agency 1 additional year if the State educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period;

(2) the State will, beginning in school year 2002-2003, participate in biennial State academic assessments of 4th and 8th grade reading and

mathematics under the National Assessment of Educational Progress carried out under section 9622(b)(2) of this title if the Secretary pays the costs of administering such assessments;

(3) the State educational agency, in consultation with the Governor, will include, as a component of the State plan, a plan to carry out the responsibilities of the State under sections 6316 and 6317 of this title, including carrying out the State educational agency's statewide system of technical assistance and support for local educational agencies;

(4) the State educational agency will work with other agencies, including educational service agencies or other local consortia, and institutions to provide technical assistance to local educational agencies and schools, including technical assistance in providing professional development under section 6319 of this title, technical assistance under section 6317 of this title, and technical assistance relating to parental involvement under section 6318 of this title;

(5) (A) where educational service agencies exist, the State educational agency will consider providing professional development and technical assistance through such agencies; and

(B) where educational service agencies do not exist, the State educational agency will consider providing professional development and technical assistance through other cooperative agreements such as through a consortium of local educational agencies;

(6) the State educational agency will notify local educational agencies and the public of the content and student academic achievement standards and academic assessments developed under this section, and of the authority to operate schoolwide programs, and will fulfill the State educational agency's responsibilities regarding local educational agency improvement and school improvement under section 6316 of this title, including such corrective actions as are necessary;

(7) the State educational agency will provide the least restrictive and burdensome regulations for local educational agencies and individual schools participating in a program assisted under this part;

(8) the State educational agency will inform the Secretary and the public of how Federal laws, if at all, hinder the ability of States to hold local educational agencies and schools accountable for student academic achievement;

(9) the State educational agency will encourage schools to consolidate funds from other Federal, State, and local sources for schoolwide reform in schoolwide programs under section 6314 of this title;

(10) the State educational agency will modify or eliminate State fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, State, and local sources for schoolwide programs under section 6314 of this title;

(11) the State educational agency has involved the committee of practitioners established under section 6573(b) of this title in developing the plan and monitoring its implementation;

(12) the State educational agency will inform local educational agencies in the State of the local educational agency's authority to transfer funds under subchapter VI of this chapter, to obtain waivers under part D of subchapter IX of this chapter, and, if the State is an Ed-Flex Partnership State, to obtain waivers under the Education Flexibility Partnership Act of 1999;

(13) the State educational agency will coordinate activities funded under this part with other Federal activities as appropriate; and

(14) the State educational agency will encourage local educational agencies and individual schools participating in a program assisted under this part to offer family literacy services (using funds under this part), if the agency or school determines that a substantial number of students served under this part by the agency or school have parents who do not have a secondary school diploma or its recognized equivalent or who have low levels of literacy.

(d) Parental involvement

Each State plan shall describe how the State educational agency will support the collection and dissemination to local educational agencies and schools of effective parental involvement practices. Such practices shall—

(1) be based on the most current research that meets the highest professional and technical standards, on effective parental involvement that fosters achievement to high standards for all children; and

(2) be geared toward lowering barriers to greater participation by parents in school planning, review, and improvement experienced.

(e) Peer review and secretarial approval

(1) Secretarial duties

The Secretary shall—

(A) establish a peer-review process to assist in the review of State plans;

(B) appoint individuals to the peer-review process who are representative of parents, teachers, State educational agencies, and local educational agencies, and who are familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other educational needs of students;

(C) approve a State plan within 120 days of its submission unless the Secretary determines that the plan does not meet the requirements of this section;

(D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c) of this section, immediately notify the State of such determination and the reasons for such determination;

(E) not decline to approve a State's plan before—

(i) offering the State an opportunity to revise its plan;

(ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c) of this section; and

(iii) providing a hearing; and

(F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items.

(2) State revisions

A State plan shall be revised by the State educational agency if it is necessary to satisfy the requirements of this section.

(f) Duration of the plan

(1) In general

Each State plan shall—

(A) remain in effect for the duration of the State's participation under this part; and

(B) be periodically reviewed and revised as necessary by the State educational agency to reflect changes in the State's strategies and programs under this part.

(2) Additional information

If significant changes are made to a State's plan, such as the adoption of new State academic content standards and State student achievement standards, new academic assessments, or a new definition of adequate yearly progress, such information shall be submitted to the Secretary.

(g) Penalties

(1) Failure to meet deadlines enacted in 1994

(A) In general

If a State fails to meet the deadlines established by the Improving America's Schools Act of 1994 (or under any waiver granted by the Secretary or under any compliance agreement with the Secretary) for demonstrating that the State has in place challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress, the Secretary shall withhold 25 percent of the funds that would otherwise be available to the State for State administration and activities under this part in each year until the Secretary determines that the State meets those requirements.

(B) No extension

Notwithstanding any other provision of law, 90 days after January 8, 2002, the Secretary shall not grant any additional waivers of, or enter into any additional compliance agreements to extend, the deadlines described in subparagraph (A) for any State.

(2) Failure to meet requirements enacted in 2001

If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph (1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.

(h) Reports

(1) Annual State report card

(A) In general

Not later than the beginning of the 2002-2003 school year, unless the State has received a 1-year extension pursuant to subsection (c)(1) of this section, a State that receives assistance under this part shall prepare and disseminate an annual State report card.

(B) Implementation

The State report card shall be—

(i) concise; and

(ii) presented in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(C) Required information

The State shall include in its annual State report card—

(i) information, in the aggregate, on student achievement at each proficiency level on the State academic assessments described in subsection (b)(3) of this section (disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged, except that such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student);

(ii) information that provides a comparison between the actual achievement levels of each group of students described in subsection (b)(2)(C)(v) of this section and the State's annual measurable objectives for each such group of students on each of the academic assessments required under this part;

(iii) the percentage of students not tested (disaggregated by the same categories and subject to the same exception described in clause (i));

(iv) the most recent 2-year trend in student achievement in each subject area, and for each grade level, for which assessments under this section are required;

(v) aggregate information on any other indicators used by the State to determine the adequate yearly progress of students in achieving State academic achievement standards;

(vi) graduation rates for secondary school students consistent with subsection (b)(2)(C)(vi) of this section;

(vii) information on the performance of local educational agencies in the State regarding making adequate yearly progress, including the number and names of each school identified for school improvement under section 6316 of this title; and

(viii) the professional qualifications of teachers in the State, the percentage of such teachers teaching with emergency or provisional credentials, and the percentage of classes in the State not taught by highly qualified teachers, in the aggregate and disaggregated by high-poverty

compared to low-poverty schools which, for the purpose of this clause, means schools in the top quartile of poverty and the bottom quartile of poverty in the State.

(D) Optional information

The State may include in its annual State report card such other information as the State believes will best provide parents, students, and other members of the public with information regarding the progress of each of the State's public elementary schools and public secondary schools. Such information may include information regarding—

(i) school attendance rates;

(ii) average class size in each grade;

(iii) academic achievement and gains in English proficiency of limited English proficient students;

(iv) the incidence of school violence, drug abuse, alcohol abuse, student suspensions, and student expulsions;

(v) the extent and type of parental involvement in the schools;

(vi) the percentage of students completing advanced placement courses, and the rate of passing of advanced placement tests; and

(vii) a clear and concise description of the State's accountability system, including a description of the criteria by which the State evaluates school performance, and the criteria that the State has established, consistent with

subsection (b)(2) of this section, to determine the status of schools regarding school improvement, corrective action, and restructuring.

(2) Annual local educational agency report cards

(A) Report cards

(i) In general

Not later than the beginning of the 2002-2003 school year, a local educational agency that receives assistance under this part shall prepare and disseminate an annual local educational agency report card, except that the State educational agency may provide the local educational agency 1 additional year if the local educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the local educational agency, prevented full implementation of this paragraph by that deadline and that the local educational agency will complete implementation within the additional 1-year period.

(ii) Special rule

If a State educational agency has received an extension pursuant to subsection (c)(1) of this section, then a local educational agency within that State shall not be required to include the information required under paragraph (1)(C) in such report card during such extension.

(B) Minimum requirements

The State educational agency shall ensure that each local educational agency collects appropriate

data and includes in the local educational agency's annual report the information described in paragraph (1)(C) as applied to the local educational agency and each school served by the local educational agency, and—

(i) in the case of a local educational agency—

(I) the number and percentage of schools identified for school improvement under section 6316(c) of this title and how long the schools have been so identified; and

(II) information that shows how students served by the local educational agency achieved on the statewide academic assessment compared to students in the State as a whole; and

(ii) in the case of a school—

(I) whether the school has been identified for school improvement; and

(II) information that shows how the school's students achievement on the statewide academic assessments and other indicators of adequate yearly progress compared to students in the local educational agency and the State as a whole.

(C) Other information

A local educational agency may include in its annual local educational agency report card any other appropriate information, whether or not such information is included in the annual State report card.

(D) Data

A local educational agency or school shall only include in its annual local educational agency

report card data that are sufficient to yield statistically reliable information, as determined by the State, and that do not reveal personally identifiable information about an individual student.

(E) Public dissemination

The local educational agency shall, not later than the beginning of the 2002-2003 school year, unless the local educational agency has received a 1-year extension pursuant to subparagraph (A), publicly disseminate the information described in this paragraph to all schools in the school district served by the local educational agency and to all parents of students attending those schools in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand, and make the information widely available through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies, except that if a local educational agency issues a report card for all students, the local educational agency may include the information under this section as part of such report.

(3) Preexisting report cards

A State educational agency or local educational agency that was providing public report cards on the performance of students, schools, local educational agencies, or the State prior to January 8, 2002, may use those report cards for the purpose of this subsection, so long as any such report card is modified, as may be needed, to contain the information required by this subsection.

(4) Annual State report to the Secretary

Each State educational agency receiving assistance under this part shall report annually to the Secretary, and make widely available within the State—

(A) beginning with school year 2002-2003, information on the State's progress in developing and implementing the academic assessments described in subsection (b)(3) of this section;

(B) beginning not later than school year 2002-2003, information on the achievement of students on the academic assessments required by subsection (b)(3) of this section, including the disaggregated results for the categories of students identified in subsection (b)(2)(C)(v) of this section;

(C) in any year before the State begins to provide the information described in subparagraph (B), information on the results of student academic assessments (including disaggregated results) required under this section;

(D) beginning not later than school year 2002-2003, unless the State has received an extension pursuant to subsection (c)(1) of this section, information on the acquisition of English proficiency by children with limited English proficiency;

(E) the number and names of each school identified for school improvement under section 6316(c) of this title, the reason why each school was so identified, and the measures taken to address the achievement problems of such schools;

(F) the number of students and schools that participated in public school choice and supplemental service programs and activities under this subchapter; and

(G) beginning not later than the 2002-2003 school year, information on the quality of teachers and the percentage of classes being taught by highly qualified teachers in the State, local educational agency, and school.

(5) Report to Congress

The Secretary shall transmit annually to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report that provides national and State-level data on the information collected under paragraph (4).

(6) Parents right-to-know

(A) Qualifications

At the beginning of each school year, a local educational agency that receives funds under this part shall notify the parents of each student attending any school receiving funds under this part that the parents may request, and the agency will provide the parents on request (and in a timely manner), information regarding the professional qualifications of the student's classroom teachers, including, at a minimum, the following:

(i) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.

(ii) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.

(iii) The baccalaureate degree major of the teacher and any other graduate certification or degree held by the teacher, and the field of discipline of the certification or degree.

(iv) Whether the child is provided services by paraprofessionals and, if so, their qualifications.

(B) Additional information

In addition to the information that parents may request under subparagraph (A), a school that receives funds under this part shall provide to each individual parent—

(i) information on the level of achievement of the parent's child in each of the State academic assessments as required under this part; and

(ii) timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher who is not highly qualified.

(C) Format

The notice and information provided to parents under this paragraph shall be in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(i) Privacy

Information collected under this section shall be collected and disseminated in a manner that protects the privacy of individuals.

(j) Technical assistance

The Secretary shall provide a State educational agency, at the State educational agency's request, technical assistance in meeting the requirements of this section, including the provision of advice by experts in the development of high- quality academic assessments, the setting of State standards, the development of measures of adequate yearly progress that are valid and reliable, and other relevant areas.

(k) Voluntary partnerships

A State may enter into a voluntary partnership with another State to develop and implement the academic assessments and standards required under this section.

(l) Construction

Nothing in this part shall be construed to prescribe the use of the academic assessments described in this part for student promotion or graduation purposes.

(m) Special rule with respect to Bureau-funded schools

In determining the assessments to be used by each operated or funded by BIA school receiving funds under this part, the following shall apply:

(1) Each such school that is accredited by the State in which it is operating shall use the assessments the State has developed and implemented to meet

the requirements of this section, or such other appropriate assessment as approved by the Secretary of the Interior.

(2) Each such school that is accredited by a regional accrediting organization shall adopt an appropriate assessment, in consultation with and with the approval of, the Secretary of the Interior and consistent with assessments adopted by other schools in the same State or region, that meets the requirements of this section.

(3) Each such school that is accredited by a tribal accrediting agency or tribal division of education shall use an assessment developed by such agency or division, except that the Secretary of the Interior shall ensure that such assessment meets the requirements of this section.

* * *

20 U.S.C. § 6812

§ 6812. Purposes

The purposes of this part are—

(1) to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet;

(2) to assist all limited English proficient children, including immigrant children and youth, to achieve

at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet, consistent with section 6311(b)(1) of this title;

(3) to develop high-quality language instruction educational programs designed to assist State educational agencies, local educational agencies, and schools in teaching limited English proficient children and serving immigrant children and youth;

(4) to assist State educational agencies and local educational agencies to develop and enhance their capacity to provide high-quality instructional programs designed to prepare limited English proficient children, including immigrant children and youth, to enter all-English instruction settings;

(5) to assist State educational agencies, local educational agencies, and schools to build their capacity to establish, implement, and sustain language instruction educational programs and programs of English language development for limited English proficient children;

(6) to promote parental and community participation in language instruction educational programs for the parents and communities of limited English proficient children;

(7) to streamline language instruction educational programs into a program carried out through formula grants to State educational agencies and local educational agencies to help limited English proficient children, including immigrant children

and youth, develop proficiency in English, while meeting challenging State academic content and student academic achievement standards;

(8) to hold State educational agencies, local educational agencies, and schools accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring—

(A) demonstrated improvements in the English proficiency of limited English proficient children each fiscal year; and

(B) adequate yearly progress for limited English proficient children, including immigrant children and youth, as described in section 6311(b)(2)(B) of this title; and

(9) to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English.

* * *

20 U.S.C. § 6842

§ 6842. Achievement objectives and accountability

(a) Achievement objectives

(1) In general

Each State educational agency or specially qualified agency receiving a grant under subpart 1 of this part shall develop annual measurable achievement objectives for limited English proficient children served under this part that relate to such children's development and attainment of English proficiency while meeting challenging State academic content and student academic achievement standards as required by section 6311(b)(1) of this title.

(2) Development of objectives

Such annual measurable achievement objectives shall be developed in a manner that—

(A) reflects the amount of time an individual child has been enrolled in a language instruction educational pro-gram; and

(B) uses consistent methods and measurements to reflect the increases described in subparagraphs (A)(i), (A)(ii), and (B) of paragraph (3).

(3) Contents

Such annual measurable achievement objectives—

(A) shall include—

(i) at a minimum, annual increases in the number or percentage of children making progress in learning English;

(ii) at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year, as determined by a valid and reliable assessment of English proficiency consistent with section 6311(b)(7) of this title; and

(iii) making adequate yearly progress for limited English proficient children as described in section 6311(b)(2)(B) of this title; and

(B) at the discretion of the agency, may include the number or percentage of children not receiving waivers for reading or language arts assessments under section 6311(b)(3)(C) of this title, but this achievement objective shall not be applied to an eligible entity that, in a given school year—

(i) has experienced a large increase in limited English proficient children or immigrant children and youth;

(ii) enrolls a statistically significant number of immigrant children and youth from countries where such children and youth had little or no access to formal education; or

(iii) has a statistically significant number of immigrant children and youth who have fled from war or natural disaster.

(b) Accountability

(1) For States

Each State educational agency receiving a grant under subpart 1 of this part shall hold eligible entities receiving a subgrant under such subpart accountable for meeting the annual measurable

achievement objectives under subsection (a) of this section, including making adequate yearly progress for limited English proficient children.

(2) Improvement plan

If a State educational agency determines, based on the annual measurable achievement objectives described in subsection (a) of this section, that an eligible entity has failed to make progress toward meeting such objectives for 2 consecutive years, the agency shall require the entity to develop an improvement plan that will ensure that the entity meets such objectives. The improvement plan shall specifically address the factors that prevented the entity from achieving such objectives.

(3) Technical assistance

During the development of the improvement plan described in paragraph (2), and throughout its implementation, the State educational agency shall—

(A) provide technical assistance to the eligible entity;

(B) provide technical assistance, if applicable, to schools served by such entity under subpart 1 of this part that need assistance to enable the schools to meet the annual measurable achievement objectives described in sub-section (a) of this section;

(C) develop, in consultation with the entity, professional development strategies and activities, based on scientifically based research, that the agency will use to meet such objectives;

(D) require such entity to utilize such strategies and activities; and

(E) develop, in consultation with the entity, a plan to incorporate strategies and methodologies, based on scientifically based research, to improve the specific program or method of instruction provided to limited English proficient children.

(4) Accountability

If a State educational agency determines that an eligible entity has failed to meet the annual measurable achievement objectives described in subsection (a) of this section for 4 consecutive years, the agency shall—

(A) require such entity to modify the entity's curriculum, program, and method of instruction; or

(B)(i) make a determination whether the entity shall continue to receive funds related to the entity's failure to meet such objectives; and

(ii) require such entity to replace educational personnel relevant to the entity's failure to meet such objectives.

(c) Special rule for specially qualified agencies

The Secretary shall hold specially qualified agencies receiving a grant under this subpart accountable for meeting the annual measurable achievement objectives described in subsection (a) of this section in the same manner as State educational agencies hold eligible entities accountable under subsection (b) of this section.